DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-1498
Title: United States, Petitioner
v.
Jason Louis Tinklenberg
Docketed: June 8, 2010
Linked with 09A921
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (06-2646, 08-1765)
Decision Date: September 3, 2009
Rehearing Denied: January 12, 2010
Questions Presented

---Date---	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Mar 31 2010	Application (09A921) to extend the time to file a petition for a writ of certiorari from April 12, 2010 to May 12, 2010, submitted to Justice Stevens.
Mar 31 2010	Application (09A921) granted by Justice Stevens extending the time to file until May 12, 2010.
Apr 27 2010	Application (09A921) to extend further the time from May 12, 2010 to June 11, 2010, submitted to Justice Stevens.
Apr 27 2010	Application (09A921) granted by Justice Stevens extending the time to file until June 11, 2010.
Jun 8 2010	Petition for a writ of certiorari filed. (Response due July 8, 2010)
Jun 9 2010	Waiver of right of respondent Jason Louis Tinklenberg to respond filed.
Jun 23 2010	DISTRIBUTED for Conference of September 27, 2010.
Jun 29 2010	Response Requested. (Due July 29, 2010)
Jul 27 2010	Order extending time to file response to petition to and including August 30, 2010.
Jul 30 2010	Brief of respondent Jason Louis Tinklenberg in opposition filed. (Distributed)
Jul 30 2010	Motion for leave to proceed in forma pauperis filed by respondent. (Distributed)
Aug 11 2010	Reply of petitioner United States filed. (Distributed)
Aug 31 2010	Letter, dated August 31, 2010, received from the Acting Solicitor General. (Distributed)
Sep 28 2010	Motion for leave to proceed in forma pauperis filed by respondent GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Sep 28 2010	Petition GRANTED. Justice Kagan took no part in the consideration or decision of this petition.
Oct 27 2010	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 1, 2010.
Oct 27 2010	The time to file respondent's brief on the merits is extended to and including January 14, 2011.
Dec 1 2010	Joint appendix filed.
Dec 1 2010	Brief of petitioner United States filed.
Jan 3 2011	CIRCULATED.
Jan 14 2011	Brief of respondent Jason Louis Tinklenberg filed. (Distributed)
Jan 20 2011	Record received from U.S.C.A. for Sixth Circuit. (1 binder)
Jan 21 2011	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Jan 26 2011	Sealed record received from U.S. District Court of Michigan. (1 envelope)
Feb 1 2011	SET FOR ARGUMENT ON Tuesday, February 22, 2011.
Feb 14 2011	Reply of petitioner United States filed. (Distributed)
Feb 22 2011	Argued. For petitioner: Matthew D. Roberts, Assistant to the Solicitor General.

Department of Justice, Washington, D. C. For respondent Jeffrey L. Fisher, Stanford, Cal.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

091498 JUN 8 - 2010

OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JASON LOUIS TINKLENBERG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the time between the filing of a pretrial motion and its disposition is automatically excluded from the deadline for commencing trial under the Speedy Trial Act of 1974, 18 U.S.C. 3161(h)(1)(D) (Supp. II 2008), or is instead excluded only if the motion actually causes a postponement, or the expectation of a postponement, of the trial.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JASON LOUIS TINKLENBERG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 579 F.3d 589. The orders of the district court denying respondent's motion to dismiss the indictment (App., *infra*, 29a-32a) and denying his motion to reconsider (App., *infra*, 33a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2009. A petition for rehearing was denied on January 12, 2010 (App., *infra*, 37a-38a). On March 31, 2010, Justice Stevens extended the time within which

to file a petition for a writ of certiorari to and including May 12, 2010. On April 27, 2010, Justice Stevens further extended the time to June 11, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this petition. App., *infra*, 39a-48a.

STATEMENT

This case involves a question about the interpretation of the Speedy Trial Act of 1974 (STA or Act), 18 U.S.C. 3161 *et seq.*, on which the courts of appeals are divided. Following a jury trial in the United States District Court for the Western District of Michigan, respondent was convicted of possessing firearms after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1), and possessing materials used to manufacture methamphetamine, in violation of 21 U.S.C. 843(a)(6). He was sentenced to 33 months of imprisonment, to be followed by three years of supervised release. Before trial, the district court had denied respondent's motion to dismiss the indictment for a violation of the STA. On appeal following respondent's conviction, the court of appeals reversed the district court's judgment and remanded with instructions to dismiss the indictment with prejudice. App., *infra*, 1a-20a.[1]

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[1] On October 13, 2008, after the district court's decision on the motion to dismiss but before the court of appeals' decision, Congress enacted the Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 13, 122 Stat. 4294, which made technical changes to the STA. As most relevant here, Congress renumbered the exclusion for pretrial motions delay, which had previously been designated as 18 U.S.C. 3161(h)(1)(F), as 18 U.S.C. 3161(h)(1)(D). Except

1. The STA generally requires a defendant's trial to begin within 70 days of his indictment or his initial appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). To provide "sufficient flexibility" to make compliance with that deadline a realistic goal, the Act "automatically" excludes from the computation of the 70-day period certain "specific and recurring periods of time often found in criminal cases." S. Rep. No. 212, 96th Cong., 1st Sess. 9 (1979); see *Bloate* v. *United States*, 130 S. Ct. 1345, 1351-1352 (2010). Among those exclusions is "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to * * * delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(D).

If the defendant is not brought to trial within the 70-day period, "the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). Dismissal may be with or without prejudice, depending on the district court's weighing of various factors. *Ibid.*; see *United States* v. *Taylor*, 487 U.S. 326, 336-337, 342-343 (1988).

2. In January 2005, a security guard at a store in Michigan notified police that respondent had purchased materials commonly used to cook methamphetamine. The guard provided a description of the camper that respondent was driving. Shortly thereafter, police officers observed respondent driving the camper and stopped him for driving with an open rear door and an

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where noted, all citations in this petition refer to the current version of the STA as codified in the 2008 Supplement to the United States Code.

expired registration tag. Respondent told the officers that he had a pistol next to the driver's seat, and the officers found a pistol there. The officers then searched the camper and found numerous Sudafed tablets, as well as other materials used to manufacture methamphetamine. Respondent also consented to a search of his residence, where officers found a shotgun. In a subsequent search of the residence pursuant to a warrant, officers found additional materials for manufacturing methamphetamine. Presentence Investigation Report (PSR) ¶¶ 5-6.

3. On October 20, 2005, a grand jury in the Western District of Michigan indicted respondent on charges of possessing firearms after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1), and possessing materials used to manufacture methamphetamine, in violation of 21 U.S.C. 843(a)(6). On October 31, 2005, respondent made his initial appearance before a judicial officer. App., *infra*, 1a-2a.

Two days later, on November 2, 2005, a magistrate judge granted respondent's request for a mental competency examination. Respondent was transported from Grand Rapids, Michigan, to the Metropolitan Correction Center in Chicago, Illinois, for the examination. On March 23, 2006, based on the results of the examination, the magistrate judge found respondent competent to stand trial. On March 29, 2006, however, respondent requested a second, independent competency evaluation, and the magistrate judge subsequently granted that request. On June 9, 2006, the magistrate judge again found respondent competent to stand trial. On July 25, 2006, the district court set a trial date of August 14, 2006. App., *infra*, 2a-4a.

Between July 25 and August 14, 2006, the parties filed, and the district court resolved, three pretrial motions. On August 1, the government filed a motion seeking permission to conduct a video deposition of a witness who was scheduled to be out of the country at the time of trial. On August 3, the district court granted the motion. On August 8, the government filed a motion seeking permission to bring the firearms possessed by respondent into the courtroom as evidence at trial. On August 10, the district court granted that motion. On August 11, respondent filed a motion to dismiss the indictment for a violation of the STA's 70-day time limit for commencing trial. On August 14, the district court denied that motion. Respondent's trial began that day and concluded two days later, with the jury finding respondent guilty of all charges. On December 13, 2006, the district court sentenced respondent to 33 months of imprisonment, to be followed by three years of supervised release. App., *infra*, 4a-5a.[2]

4. Respondent appealed, and the court of appeals reversed the district court's Speedy Trial Act ruling and remanded with instructions to dismiss the indictment with prejudice. App., *infra*, 1a-28a.

The court of appeals found that the speedy trial clock began to run on October 31, 2005, the date of respondent's initial appearance, App., *infra*, 7a-9a, and that the days on which a pretrial motion is filed and resolved are excluded from the speedy trial calculation, *id.* at 9a-11a. The court ruled that the periods of delay involving

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[2] On April 21, 2008, while respondent's appeal was pending, he was released from prison and began his supervised release. On May 30, 2008, the district court found that respondent had violated the terms of his supervised release and sentenced him to 14 additional months in prison. App., *infra*, 5a-6a.

the two mental competency examinations of respondent were generally excludable under 18 U.S.C. 3161(h)(1)(A), except that two of the 12 days that it took to transport respondent to the first mental competency examination were not excludable under 18 U.S.C. 3161(h)(1)(F). Accordingly, the court of appeals determined that only 60 non-excludable days had elapsed as of July 31, 2006. App., *infra*, 11a-15a.

The court of appeals held, however, that the nine days spent resolving pretrial motions between August 1, 2006, and the start of trial on August 14, 2006, were not excludable under 18 U.S.C. 3161(h)(1)(D). App., *infra*, 15a-20a. The court acknowledged that "[e]very circuit to have addressed the issue appears to have held that the filing of any pretrial motion stops the Speedy Trial clock, regardless of whether the motion has any impact on the trial's start date." *Id.* at 16a (citing cases). Expressly "disagree[ing]" with that "consensus," however, the court held that "a pretrial motion must actually cause a delay, or the expectation of a delay, of trial in order to create excludable time." *Ibid.* In the court's view, because Section 3161(h)(1)(D) refers to "delay resulting from" pretrial motions, "[t]here is no conceivable way to read" the statute except "as excluding the time in which pretrial motions are filed and pending only if they could possibly cause any delay of trial." *Id.* at 16a-19a. Because the district court did not postpone respondent's scheduled trial date after the filing of the three pretrial motions, and the court of appeals found no indication that the motions "threatened to delay the trial," the court of appeals concluded that the time consumed in resolving the motions was not excluded under Section 3161(h)(1)(D). *Id.* at 19a-20a.

Based on that holding, the court of appeals concluded that a total of 73 non-excludable days elapsed before respondent's trial began and therefore that the trial commenced three days after the expiration of the STA's deadline. App., *infra*, 20a. Rather than remand the case to the district court for a determination under 18 U.S.C. 3162(a)(2) whether to dismiss the indictment with or without prejudice, the court of appeals itself conducted that analysis and remanded with instructions to dismiss the indictment with prejudice. App., *infra*, 21a-22a. The court acknowledged that "the seriousness of the offense" and "the facts and circumstances" that "led to the dismissal," 18 U.S.C. 3162(a)(2), "point[ed] to dismissal without prejudice." App., *infra*, 21a. Nonetheless, the court concluded that dismissal with prejudice was required because respondent had already completed his term of imprisonment. *Id.* at 21a-22a.[3]

Judge Gibbons concurred. App., *infra*, 23a-28a. She disagreed with the majority's calculation of the excludable delay related to the transportation of respondent to and from the first mental competency examination. *Id.* at 17a-19a. Judge Gibbons also believed that respondent had not properly preserved a claim that the three pretrial motions resolved in August did not result in excludable delay, *id.* at 19a-20a, but she agreed with the

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[3] Respondent was released from prison on May 15, 2009. See http://www.bop.gov/iloc2/LocateInmate.jsp. He had not completed his term of supervised release at the time that the court of appeals ordered dismissal of the indictment. Based on the court of appeals' decision, however, the district court discharged respondent from supervised release before he completed that term. 1:05-CR-239 Docket entry No. 256 (W.D. Mich. Sept. 3, 2009). Accordingly, respondent would still have supervised release to serve if this Court were to reverse the court of appeals' judgment.

majority's reading of Section 3161(h)(1)(D) as a matter of statutory interpretation, and she agreed that dismissal with prejudice was warranted. *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

The court of appeals incorrectly interpreted a critically important provision of the Speedy Trial Act, 18 U.S.C. 3161(h)(1)(D), the plain text of which automatically excludes from the Act's deadline for commencing trial "delay resulting from any pretrial motion." According to the court, pretrial motion delay is excludable only if the motion actually causes a postponement, or the expectation of a postponement, of the trial. That interpretation conflicts with the interpretation adopted by all the other courts of appeals with criminal jurisdiction, which have uniformly held that Section 3161(h)(1)(D) automatically excludes all time "from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion," *ibid.*, whether or not the trial is postponed. The majority rule is correct and finds strong support in this Court's decision in *Henderson* v. *United States*, 476 U.S. 321 (1986). The issue also is an important and recurring one in the day-to-day administration of criminal justice in the federal district courts. Accordingly, this Court's review is warranted.

A. The Decision Of The Court Of Appeals Conflicts With Decisions Of Other Courts Of Appeals

With its decision in this case, the Sixth Circuit stands alone among the courts of appeals in holding that "a pretrial motion must actually cause a delay, or the expectation of a delay, of trial in order to create excludable time" under Section 3161(h)(1)(D). App., *infra*, 16a. As the court acknowledged, the First, Third, Fourth, Sev-

enth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have held that "the filing of any pretrial motion stops the Speedy Trial clock, regardless of whether the motion has any impact on the trial's start date." *Ibid.* (citing *United States* v. *Wilson*, 835 F.2d 1440, 1443 (D.C. Cir. 1987); *United States* v. *Hood*, 469 F.3d 7, 10 (1st Cir. 2006); *United States* v. *Arbelaez*, 7 F.3d 344, 347 (3d Cir. 1993); *United States* v. *Dorlouis*, 107 F.3d 248, 253-254 (4th Cir.), cert. denied, 521 U.S. 1126 (1997); *United States* v. *Montoya*, 827 F.2d 143, 151 (7th Cir. 1987); *United States* v. *Titlbach*, 339 F.3d 692, 698 (8th Cir. 2003); *United States* v. *Vo*, 413 F.3d 1010, 1015 (9th Cir.), cert. denied, 546 U.S. 1053 (2005); *United States* v. *Vogl*, 374 F.3d 976, 985 (10th Cir. 2004); *United States* v. *Miles*, 290 F.3d 1341, 1350 (11th Cir.), cert. denied, 537 U.S. 1089 (2002)). The Second and Fifth Circuits have reached the same conclusion. See *United States* v. *Cobb*, 697 F.2d 38, 42 (2d Cir. 1982), abrogated on other grounds by *Henderson* v. *United States*, 476 U.S. 321 (1986); *United States* v. *Green*, 508 F.3d 195, 200 (5th Cir. 2007), cert. denied, 128 S. Ct. 2871 (2008). The court below expressly "disagree[d]" with the "consensus" of the other courts of appeals, App., *infra*, 16a, and interpreted Section 3161(h)(1)(D) "as excluding the time in which pretrial motions are filed and pending only if they could possibly cause any delay of trial." *Id.* at 19a.

As a result of the decision below, the Act's requirements vary depending on where the defendant is tried. Time consumed by motions will uniformly constitute excludable delay outside the Sixth Circuit but may not stop the speedy trial clock within it. This Court should grant certiorari to ensure that defendants' rights to a speedy trial are the same no matter where the trial takes place.

B. The Decision Of The Court Of Appeals Is Incorrect

The court of appeals concluded that the "clear" language of Section 3161(h)(1)(D) indicates that time consumed in resolving pretrial motions is excludable only when the motions caused, or threatened to cause, postponement of the trial. App., *infra*, 17a. That conclusion is incorrect. Section 3161(h)(1)(D) excludes "[a]ny period" of "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(D). Thus, "[t]he plain terms of the statute appear to exclude all time between the filing of and the hearing on a motion" without any further factual inquiry. *Henderson*, 476 U.S. at 326. This Court's decisions as well as practical and policy considerations confirm that reading of the statute.

1. In *Henderson*, the Court granted review to resolve a conflict over whether Section 3161(h)(1)(D) excludes delay from a pretrial motion only if the delay was "reasonably necessary." 476 U.S. at 325 n.6. The Court rejected a reasonableness requirement, holding instead that "Congress intended [Section 3161(h)(1)(D)] to exclude from the Speedy Trial Act's 70-day limitation all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary.'" *Id.* at 330. The Court explained that the exclusion in Section 3161(h)(1)(D), like almost all the other exclusions in Section 3161(h), is "intended to be automatic." *Henderson*, 476 U.S. at 327 (citation omitted).

The Court's determination in *Henderson* that the defendant's pretrial motions gave rise to excludable delay stands in sharp contrast to the approach taken by the Sixth Circuit here. Applying its interpretation of Sec-

tion 3161(h)(1)(D), *Henderson* held that the time consumed in resolving the pretrial motions at issue was "automatically excludable," without considering whether the motions actually caused postponement, or the expectation of a postponement, of the trial. 476 U.S. at 331-332; cf. App., *infra*, 16a (Sixth Circuit rule requiring delay, or the expectation of delay, of trial). The Court's opinion does not discuss whether a trial date had been set before the motions were filed or whether the district court rescheduled the trial date to accommodate the proceedings on the motions.[4] Thus, the Court's application of Section 3161(h)(1)(D) in *Henderson* indicates that time consumed in resolving pretrial motions is automatically excluded regardless of whether it causes or threatens a postponement of the trial.[5]

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[4] In fact, the record indicates that the initially scheduled trial date had passed six weeks before the motions at issue were filed, and the district court therefore concluded that the trial date had been "vacated" "by inference." J.A. at 25, *Henderson* v. *United States*, 476 U.S. 321 (1986), No. 84-1744. The court did not set a new trial date until after the motions had been resolved. See *id.* at 25-32.

[5] More recently, in *Bloate*, the Court reiterated its conclusion in *Henderson* that Section 3161(h)(1)(D)'s exclusion is "automatic" and requires the exclusion of delay resulting from any pretrial motion "without any further analysis as to whether the benefit of the delay outweighs its costs" and "regardless of the specifics of the case." 130 S. Ct. at 1349 n.1. The Court held that time granted to prepare pretrial motions is not excluded by Section 3161(h)(1)(D), however, because that provision "renders automatically excludable only the delay that occurs '*from the filing* of the motion through the conclusion of the hearing on, or other prompt disposition of[,]' the motion." *Id.* at 1353 (quoting 18 U.S.C. 3161(h)(1)(D)) (emphasis added by Court). Thus, like *Henderson*, *Bloate* strongly suggests that Section 3161(h)(1)(D) automatically excludes the time between the filing of any pretrial motion and its disposition regardless whether a court finds that the motion actually postponed the trial.

2. The court of appeals rejected that reading of Section 3161(h)(1)(D) because it believed that the phrase "delay resulting from" necessarily refers to delay in the commencement of the trial. But the statute's text does not refer to delay of the trial or a continuance of the trial date. And, in light of the STA's purpose, practical considerations in implementing the Act, and its legislative history, it is clear that "the 'delay' referred to is not of the trial itself, but instead of the final date on which the trial must commence." *Cobb*, 697 F.2d at 42. The "delay resulting from" a pretrial motion is thus the interval of time between the filing and resolution of the motion "during which the speedy trial clock [is] stopped and the expiration of the 70-day period thereby postponed." *Ibid.*

The STA's purpose is to afford a reasonably prompt trial, while providing the parties and the court sufficient time for fair and orderly preparation. See *Zedner* v. *United States*, 547 U.S. 489, 497 (2006); S. Rep. No. 212, 96th Cong., 1st Sess. 19-20, 26 (1979); S. Rep. No. 1021, 93d Cong., 2d Sess. 20-21 (1974); H.R. Rep. No. 1508, 93d Cong., 2d Sess. 8, 15, 21-22 (1974). As other courts of appeals have recognized, Congress provided for the automatic exclusion of all time consumed in resolving pretrial motions in order "to structure a method of calculating time which would be reasonably and practically, although not necessarily directly, related to the just needs for pretrial preparation in a particular case." *Cobb*, 697 F.2d at 42.

The automatic exclusion reflects the reality that "[p]retrial motions necessarily take the time of [the opposing party] to respond and courts to evaluate." *Wilson*, 835 F.2d at 1442. And it also accounts for the practical necessity that, in order to ensure that trial com-

mences within the STA's deadline in a particular case, the district court and the parties must know, as each day passes, whether or not that day counts towards the Act's 70-day limit. Thus, as soon as a pretrial motion has been filed, the court and the parties must be able to ascertain whether or not the motion has stopped the speedy trial clock. "[A] clear rule" that all time consumed in resolving any pretrial motion is automatically excluded "puts [the court and] counsel on notice from the outset as to what is excludable." *Vo*, 413 F.3d at 1015-1016. It thus facilitates compliance with the Act while advancing the Act's goal of providing speedy trials without sacrificing the time needed to resolve important pretrial proceedings.

In contrast, the Sixth Circuit's test for when pretrial motions delay is excluded is neither clear nor consonant with the Act's purpose. It is unclear from the court's opinion whether excludability turns on a fact-specific determination whether a particular motion actually necessitated or threatened postponement of the trial or turns instead on whether the trial court formally moved the trial date in response to the motion. In either case, the test does not provide a workable rule that furthers the goals of the Act.

If excludability turns on an individualized determination whether a particular motion actually caused or threatened postponement of the trial, the test will greatly complicate, and may frustrate altogether, the parties' and the court's ability to comply with the Act. Neither the court nor the parties will be able to determine at the time that a motion is filed whether that motion has stopped the speedy trial clock. That question could not be answered until it is possible to ascertain whether the

motion ultimately required or threatened putting off the trial.

Requiring individualized determinations whether a particular motion actually caused or threatened postponement of the trial would also "force courts to resolve intractable causation issues," *Wilson*, 835 F.2d at 1442, leading to extensive pretrial proceedings and even collateral litigation about whether time is excludable, *Dorlouis*, 107 F.3d at 254. For example, if the parties were also engaged in discovery activities while a pretrial motion was pending, the district court would have to determine which of the two activities was responsible for the postponement of the trial. Such "question[s] frequently would pose more difficult issues than the trial itself and in some cases would be simply impossible to determine." *Cobb*, 697 F.2d at 42 n.6.

If, on the other hand, excludability turns on whether the district court formally moves the trial date, the Sixth Circuit's test will lead to arbitrary results that bear no relation to the Act's purpose. For example, if a district court initially sets the trial date sufficiently far out to accommodate the resolution of anticipated pretrial motions, the time consumed in resolving those motions will not be excluded. If, however, the district court does not take the motions into account in setting the initial trial date and resets the date after the motions are filed, the time consumed in resolving them will be excluded. In addition, if a district court puts off other matters so it can resolve motions quickly and therefore does not need to reset the trial date, no time consumed in resolving the motions will be excluded. If, however, the court sets a more relaxed schedule for resolving the motions that enables it simultaneously to address other matters, and

the court therefore needs to reset the trial date, the entire time that the motions are pending will be excluded.

The Sixth Circuit's test would be equally problematic when, as in *Henderson* (see note 4, *supra*), the district court does not set the trial date until after motions are filed or resolved. In that situation, it is entirely unclear how the courts and the parties are to determine whether or not time consumed in resolving the motions is excludable. Since no trial date exists to be reset, courts and parties would have to guess at whether motions create either the reality or an "expectation" of delay of trial.

The Sixth Circuit's test is also inconsistent with the Act's legislative history. As numerous courts of appeals have noted, the legislative history confirms that Congress intended automatically to exclude all time from the filing of a pretrial motion through its disposition, without further inquiry or additional findings. See *Green*, 508 F.3d at 200; *Vogl*, 374 F.3d at 985-986; *Wilson*, 835 F.2d at 1443; *Montoya*, 827 F.2d at 151; *Cobb*, 697 F.2d at 42. See, *e.g.*, S. Rep. No. 212, at 9 (noting that "the Act excludes from [the] computation" of the 70-day time limit "periods consumed by * * * proceedings concerning the defendant, including * * * pretrial motions"); *id.* at 33 (observing that "periods of delay consumed by" motions are "automatically excluded"); *id.* at 34 (stating that Section 3161(h)(1)(D) "provides exclusion of time from filing to the conclusion of hearings on or 'other prompt disposition' of any motion"). At no point in the Act's legislative "history did anyone suggest that the period of delay 'resulting from' a proceeding might be something other than the duration of the proceeding itself." Anthony Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 26 (1980).

C. The Question Presented Is Of Substantial And Recurring Importance

The court of appeals' erroneous ruling presents an important and recurring issue in the day-to-day administration of criminal justice in the federal system. Pretrial motions are filed in nearly every federal criminal prosecution. The decision below needlessly complicates the calculation of the STA's 70-day time limit for commencing a defendant's trial when such motions are filed in prosecutions within the Sixth Circuit. As described above, if the Sixth Circuit's test requires an individualized determination that a particular motion actually postponed or threatened postponement of the trial, it will prevent district courts and the parties from calculating in advance the STA's deadline for commencing trial and enmesh courts and litigants in disputes over complicated causation issues, thereby adding to, rather than reducing, pretrial delay. If, on the other hand, the Sixth Circuit's test turns solely on whether the district court moves the trial date in response to a pretrial motion, the test will lead to formalistic and arbitrary results that do not advance the STA's purpose and will produce great uncertainty when a motion is filed before a trial date has been set.

The problems created by the court of appeals' ruling may well spread beyond the exclusion of time consumed by pretrial motions. Many other exclusions under the STA contain the same "delay resulting from" language on which the court below relied in imposing its novel requirement that delay from pretrial motions is excluded only if they actually cause or threaten to cause postponement of the trial. The same language appears in the provisions authorizing exclusion of delays associated with mental and physical competency examinations,

18 U.S.C. 3161(h)(1)(A); trial of the defendant on other charges, 18 U.S.C. 3161(h)(1)(B); interlocutory appeals, 18 U.S.C. 3161(h)(1)(C); proceedings relating to the transfer of a case or the removal of any defendant from another district, 18 U.S.C. 3161(h)(1)(E); transportation of any defendant from another district or to and from places of examination or hospitalization, 18 U.S.C. 3161(h)(1)(F); consideration of a proposed plea agreement, 18 U.S.C. 3161(h)(1)(G); the absence or unavailability of the defendant or an essential witness, 18 U.S.C. 3161(h)(3)(A); the defendant's mental incompetence or physical inability to stand trial, 18 U.S.C. 3161(h)(4); and ends-of-justice continuances under 18 U.S.C. 3161(h)(7)(A). The logic of the court of appeals' opinion could lead courts to adopt a proceeding-specific trial-postponement requirement for those exclusions as well. Cf. *Henderson*, 476 U.S. at 327 (construing the exclusion for pretrial-motion delay as similar to the "automatic" exclusion of time consumed by interlocutory appeals, competency examinations, and unavailability of the defendant). The decision below thus threatens serious disruption of the operation of the STA within the Sixth Circuit.

This Court's review is warranted to correct the court of appeals' misinterpretation of the STA, to resolve the disagreement among the courts of appeals, and to restore the smooth functioning of the Act within the Sixth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 06-2646 & 08-1765

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JASON LOUIS TINKLENBERG, DEFENDANT-APPELLANT

Argued: June 19, 2009
Decided and Filed: Sept. 3, 2009

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids
No. 05-00239-001—Richard A. Enslen, District Judge;
Paul Lewis Maloney, Chief District Judge

OPINION

Before: KEITH, CLAY, and GIBBONS, Circuit Judges.

CLAY, J., delivered the opinion of the court, in which KEITH, J., joined. GIBBONS, J. delivered a separate concurring opinion.

CLAY, Circuit Judge. Defendant-Appellant Jason Louis Tinklenberg ("Tinklenberg") appeals his conviction and sentence after a jury found him guilty of one

count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), and two counts of possessing material to manufacture methamphetamine, in violation of 21 U.S.C. § 843. On appeal, Tinklenberg contends that the district court improperly denied his motion to dismiss the indictment, because his trial began after the deadline imposed by the Speedy Trial Act. Tinklenberg also challenges the district court's subsequent finding that he violated the terms of his supervised release, as well as the reasonableness of his ensuing prison sentence. Because Tinklenberg's trial violated the Speedy Trial Act, we **REVERSE** Tinklenberg's conviction and **REMAND** with instructions to dismiss his indictment with prejudice.

BACKGROUND

On October 20, 2005, the government charged Tinklenberg in an indictment in the Western District of Michigan with one count of being a felon in possession of a firearm and two counts of possessing items used to manufacture methamphetamine. At Tinklenberg's initial appearance on October 31, 2005, a magistrate judge ordered him detained, and scheduled an arraignment hearing for November 2, 2005. On November 2, 2005, prior to his scheduled arraignment, Tinklenberg moved to receive a psychological evaluation for competency to stand trial. That day, instead of arraigning Tinklenberg, the magistrate judge granted Tinklenberg's motion, committing Tinklenberg "for a period not to exceed 30 days for placement in an appropriate facility" for psychological evaluation. (ROA at 4, 36.) Tinklenberg was transported to the Metropolitan Correctional Center in Chicago (the "MCC") for testing.

On December 16, 2005, the government requested a thirty day extension of time to complete Tinklenberg's psychological evaluation, stating in its motion that the prison psychiatrist responsible for evaluating Tinklenberg had reported that Tinklenberg "was not cooperating in the effort to evaluate him." (ROA at 38-39.) On December 20, 2005, the district court granted the government's request for an extension, and ordered that Tinklenberg's trial be held in abeyance until his psychological evaluation was completed. On December 28, 2005, the magistrate judge set a deadline of February 13, 2006, for completion of the testing. On February 10, 2006, the government requested a second extension of time, until March 13, 2006, for completion of Tinklenberg's evaluation. The government's request stated that the psychiatrist at the MCC had said that he needed an additional four weeks to complete the evaluation, but did not explain the cause of the further delay. On February 17, 2006, the magistrate judge granted the government's second request and set March 13, 2006 as the new deadline for completion of Tinklenberg's evaluation.

On March 20, 2006, the court received the MCC's psychiatric report on Tinklenberg. Enclosed with the MCC's evaluation was a cover letter from the warden of the MCC, which stated that Tinklenberg "was designated to the [MCC] on November 10, 2005, and arrived at the Institution on November 30, 2005." (ROA at 147.) On March 22, 2006, the magistrate judge held a competency hearing, and by order dated March 23, 2006, found Tinklenberg competent to stand trial. On March 23, 2006, the magistrate judge also arraigned Tinklenberg, who pled not guilty to all three counts against him. By order dated March 27, 2006, the district court set the case down for trial on May 30, 2006.

On March 29, 2006, Tinklenberg filed an *ex parte* petition to receive an independent competency evaluation. On April 17, 2006, the magistrate judge granted Tinklenberg's petition, ordered the independent evaluator to submit his report to the court by May 15, 2006, and stated that "the period of time until Defendant's competency is determined shall be excluded time for the purposes of the Speedy Trial Act[.]" (ROA at 53-54.)

On April 26, 2006, Tinklenberg filed a pro se motion for new counsel, and on May 9, 2006, Tinklenberg's counsel moved to withdraw as Tinklenberg's attorney. Counsel's motion indicated that Tinklenberg would not cooperate with the independent evaluator. The district court once again adjourned the trial date and referred the motions by Tinklenberg and his counsel to the magistrate judge to resolve. On June 7, 2006, the magistrate judge held a hearing on the motions, and, on June 9, 2006, ordered new counsel appointed. With respect to Tinklenberg's competency evaluation, though the magistrate judge's June 9, 2006 order is somewhat ambiguous, it appeared to find Tinklenberg competent, noting that the independent evaluator had concluded as much and that Tinklenberg now opposed the evaluation. The district court then scheduled Tinklenberg's trial for August 15, 2006. On July 25, 2006, the case was reassigned to a new district judge, and the new judge issued an order moving the trial date forward one day, to August 14, 2006.

On August 1, 2006, the government requested permission to conduct a video deposition of a witness. On August 3, 2006, the district court granted the government's motion, but ordered that "[t]he parties shall schedule said deposition posthaste so as not to delay

trial." (ROA at 115.) On August 8, 2006, the government filed a request to bring two guns into the courtroom during the trial as evidence, a request the court granted on August 10, 2006.

On August 11, 2006, Tinklenberg moved to dismiss his indictment, claiming that the time required for trying him pursuant to the Speedy Trial Act had lapsed. On August 14, 2006, the morning of trial, the district court denied Tinklenberg's motion, finding that only sixty-nine days had lapsed for the purposes of the Speedy Trial Act.

Tinklenberg's trial began on August 14, 2006, and on August 16, 2006, the jury convicted Tinklenberg on all three counts. On December 13, 2006, the district court sentenced Tinklenberg to thirty-three months of imprisonment, followed by three years of supervised release. On December 18, 2006, Tinklenberg filed a notice of appeal of his conviction and sentence.

On April 21, 2008, while the appeal of his conviction and sentence was still pending, Tinklenberg was released from prison. On April 28, 2008, Tinklenberg was re-arrested for violating the terms of his supervised release by testing positive for cocaine. On May 16, 2008, the district court held an evidentiary hearing, at which a probation officer testified that on April 23, 2008, he took a urine sample from Tinklenberg that tested positive for cocaine. The government introduced into evidence the lab report showing the test results and Tinklenberg's signed statement admitting to cocaine use. On May 30, 2008, the district court found that Tinklenberg had violated the terms of his supervised release by using cocaine, and sentenced Tinklenberg to fourteen addi-

tional months in prison. Tinklenberg timely appealed the additional sentence.

Tinklenberg's challenge to his initial conviction, and his appeals of the finding that he violated his supervised release and the ensuing sentence, were consolidated on appeal.

DISCUSSION

1. Speedy Trial Act Calculations

The Speedy Trial Act, 18 U.S.C. §§ 3161-74, mandates that "[i]n any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." § 3161(c)(1). The Speedy Trial Act allows exclusions of time from the seventy day rule, including, *inter alia*,

> [a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to (A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant; . . . (D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion; . . . [and] (F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an

> order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable[.]

§ 3161(h)(1). The defendant bears the burden of proof to show a violation warranting dismissal. § 3162(a)(2). This Court "reviews the district court's interpretation of the Speedy Trial Act *de novo* and its factual findings for clear error." *United States v. Marks*, 209 F.3d 577, 586 (6th Cir. 2000).

Tinklenberg was indicted on October 20, 2005 and his trial began 287 days later, on August 14, 2006. The district court found that only sixty-nine non-excludable days lapsed during the interval.

A. The Start of the Speedy Trial Clock

The district court found that the Speedy Trial clock began to run on October 31, 2005, the date that Tinklenberg first appeared after his October 20, 2005 indictment. The government argues that in cases such as this one—where an indictment is filed and the defendant subsequently appears, but does not plead not guilty until a later date—the seventy day period does not begin until the not guilty plea. However, this Court has held that where the defendant's not guilty plea follows his indictment and initial appearance, whichever of the indictment or initial appearance that occurs last starts the seventy day period. *United States v. Mentz*, 840 F.2d 315, 325-26 (6th Cir. 1988).

Moreover, the plain language of the statute supports starting the clock from the date Tinklenberg initially appeared. "*In any case in which a plea of not guilty is entered*, the trial of a defendant . . . shall commence within seventy days from the filing date (and making

public) of the information or indictment, *or from the date the defendant has appeared* before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1) (emphasis added). Thus, the statute refers to the defendant's plea in setting forth the general *precondition* that the Speedy Trial Act's requirements are only relevant in cases in which the defendant proceeds to trial; otherwise, the statute make no reference to the not guilty plea. *See id.* However, the statute uses different language, *i.e.*, "the date the defendant has appeared," as the time the seventy day period begins, if the indictment has already been filed. *Id.* The well-established rule that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion[,]" *Russello v. United States*, 464 U.S. 16, 23 (1983), applies even more clearly where Congress uses contrasting language in the same sentence. Thus, under the plain language of the statute, "the date the defendant has appeared," and not the defendant's "plea of not guilty," begins the seventy day period.

The government cites *United States v. O'Dell*, 154 F.3d 358, 360-62 (6th Cir. 1998), to support its opposing position that if the initial appearance occurs before a defendant's not guilty plea, the date of the not guilty plea is the event that starts the clock. However, *O'Dell* is inapposite. In *O'Dell*, the defendant initially agreed to plead guilty to manufacturing marijuana pursuant to an information before an indictment was ever filed, and then subsequently withdrew his plea. 154 F.3d at 359. The government then indicted him for the first time, and he pled not guilty. *Id.* at 359-60. This Court held that

the defendant's indictment represented an entirely new case against the defendant, and that the defendant's initial appearance after that indictment, when he pled not guilty, triggered the Speedy Trial clock. *Id.* at 362. This Court found that the clock never started in the defendant's earlier case, because he never entered a not guilty plea in the earlier case. Thus, *O'Dell* stands only for the proposition that the Speedy Trial Act does not apply to a case in which the defendant never pleads not guilty. Although this Court opined that the Speedy Trial Act "requires a not guilty plea to begin the clock running," that statement was irrelevant to the outcome of the case and was therefore *dicta*. *See United States v. Lopez-Valenzuela*, 511 F.3d 487, 490 (5th Cir. 2007) (concluding that this Court's finding in *O'Dell* that a defendant's not guilty plea starts the seventy day period was *dicta*).

In short, although the Speedy Trial Act applies only to cases in which the defendant has entered a not guilty plea, the initial appearance after the indictment is the event that triggers the seventy day period. Accordingly, Tinklenberg's initial appearance on October 31, 2005 triggered the Speedy Trial Act's seventy day period. Following Tinklenberg's initial appearance, one day, November 1, 2005, lapsed before Tinklenberg moved for, and the court granted, a competency evaluation on November 2, 2005. The Speedy Trial clock thereby stopped after one day had lapsed.

B. Days Pretrial Motions are Filed and Decided

This Court has been somewhat inconsistent with respect to whether the day a pretrial motion is filed and the day the court disposes of it should be excluded from the Speedy Trial period. *See, e.g., United States v.*

Crawford, 982 F.2d 199, 203-04 (6th Cir. 1993) (days on which motion is filed and resolved are excluded); *United States v. Thomas*, 49 F.3d 253, 256 (6th Cir. 1995) (day on which motion is filed is excluded, but day on which motion is resolved is included). However, the plain language of the statute mandates excluding the days on which motions are filed and resolved. *See* § 3161(h)(1)(D) (excluding "delay resulting from any pretrial motion, *from* the filing of the motion *through* the conclusion of the hearing on, or other prompt disposition of, such motion") (emphasis added). Moreover, the vast majority of appellate courts exclude the dates on which motions are filed and resolved. *See, e.g.*, *United States v. Fonseca*, 435 F.3d 369, 372 (D.C. Cir. 2006); *United States v. Papaleo*, 853 F.2d 16, 21 (1st Cir. 1988); *United States v. Oberoi*, 547 F.3d 436, 454 (2d Cir. 2008); *Gov't of Virgin Islands v. Duberry*, 923 F.2d 317, 320 n.8 (3d Cir. 1991); *United States v. Stoudenmire*, 74 F.3d 60, 63 (4th Cir. 1996); *United States v. Johnson*, 29 F.3d 940, 943 n.4 (5th Cir. 1994); *United States v. Daychild*, 357 F.3d 1082, 1093 (9th Cir. 2004); *United States v. Yunis*, 723 F.2d 795, 797 (11th Cir. 1984).

Thus, we will exclude from the time computation the dates pretrial motions were filed and resolved. In this case, the only two pretrial motions relevant to the Speedy Trial Act were the two competency evaluations.[1]

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[1] Tinklenberg's motion for a new counsel and his counsel's motion to withdraw did not have any impact on the Speedy Trial clock because both were filed after Tinklenberg moved for an independent competency evaluation on March 29, 2006, and were resolved on June 9, 2006, the same day as the court ruled on the competency motion. The only other pretrial motions at issue are the three pretrial motions filed in August 2006, during the two weeks prior to trial, but those motions do

Under § 3161(h)(1)(A), delays caused by competency evaluations are treated as a special category of excluded time, which will be discussed in detail below. However, § 3161(h)(1)(A) does not specifically instruct whether to count the days on which motions for such evaluations are made and resolved. *See* § 3161(h)(1)(A) (stating only that "delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant" is excluded). Because the two incompetency evaluations were commenced by way of pretrial motions raised by Tinklenberg, we will exclude the days those motions were raised and resolved from the seventy day period, just as we would in the case of any other pretrial motion.

C. Competency Evaluations

The district court excluded from the Speedy Trial clock all of the days from November 2, 2005 to March 23, 2006, and from March 29, 2006 to June 9, 2006, because Tinklenberg's two competency determinations were pending during those periods. On appeal, Tinklenberg argues that 18 U.S.C. § 4247(b), which generally sets the rules by which courts may commit defendants for psychiatric evaluations and limits the period a defendant may be committed for evaluation to thirty days, should be applied to limit the time excludable under the Speedy Trial Act to thirty days for Tinklenberg's competency evaluations. Pursuant to § 4247(b), "[f]or the purposes of an examination pursuant to [a court] order, . . . the court may commit the person to be examined for a reasonable period, but not to exceed thirty days[.]" However, this Court and "[e]very court that has decided this

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not create excludable time for the reasons discussed in Section I.D below.

issue ha[ve] concluded that § 4247(b) does not limit the time period for a competency examination with respect to calculations under the Speedy Trial Act." *United States v. Murphy*, 241 F.3d 447, 456 (6th Cir. 2001). Accordingly, Tinklenberg's argument fails.

Of more substance is Tinklenberg's argument that the Speedy Trial Act limits to ten days the time excludable for the transportation of a defendant to and from the location of his competency evaluation. Although 18 U.S.C. § 3161(h)(1)(A) appears to exclude all time during which a defendant's competency evaluation and determination is pending, § 3161(h)(1)(F) provides that any delay caused by the transportation of a defendant "to and from places of examination or hospitalization" that is longer than ten days is "presumed to be unreasonable." Whether the ten day limit in § 3161(h)(1)(F) applies to the time in which a defendant is transported to a place of examination pursuant to a court's competency evaluation order appears to be a matter of first impression for this Court.[2] The few other appellate courts to have

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[2] The government and the concurring opinion both cite *Murphy*, arguing that this Court has already held that any delay in transporting a defendant for a mental competency examination is excludable, notwithstanding the ten day limit imposed by § 3161(h)(1)(F). However, the Court in *Murphy* did not address the interplay between § 3161(h)(1)(A) and § 3161(h)(1)(F), because the defendant's failure to submit any evidence of the duration of his transportation in support of his argument for a ten day limitation allowed this Court to reject the defendant's argument before reaching its merits. 241 F.3d at 455. After rejecting the claim for lack of evidence, we stated, "[w]e also conclude that Defendant's contention is without merit." *Id.* However, that statement was not necessary to the outcome, was not accompanied by any interpretation of the statute, and was followed by a citation to *Noone*, whose interpretation of the statutes we follow today. *Id.* at 455-56.

ruled on the issue are split: the First and Fifth Circuits have held that an unreasonable delay in the transportation of the defendant for a competency determination is not excludable, *see United States v. Noone*, 913 F.2d 20, 25-26 (1st Cir. 1990) and *United States v. Castle*, 906 F.2d 134, 137 (5th Cir. 1990), while the Second Circuit has held that *any* delay associated with a competency evaluation from the date of the order directing the evaluation until completion of the competency hearing, including delay from transporting a defendant for the evaluation, is excludable under § 3161(h)(1)(A), *see United States v. Vasquez*, 918 F.2d 329, 333 (2d Cir. 1990).

We hold that a delay in transporting a defendant to a mental competency examination beyond the ten day limit imposed by § 3161(h)(1)(F) is presumptively unreasonable, and in the absence of rebutting evidence to explain the additional delay, this extra time is not excludable. Reading § 3161(h)(1)(A) to allow unlimited time for transporting a defendant to a place of examination, as the Second Circuit did in *Vasquez*, would create an internal conflict in the statute, since § 3161(h)(1)(F) expressly limits the reasonableness of the transportation period to ten days. *See Noone*, 913 F.2d at 25 n.5 (finding that allowing unlimited excluded time for transporting defendants to competency evaluation "would render mere surplusage the specific reference in [§ 3161(h)(1)(F)] to transportation 'to and from places of examination or hospitalization'"). The only way to avoid conflict between § 3161(h)(1)(A) and § 3161(h)(1)(F) is to read § 3161(h)(1)(F) as a specific exception to the general rule announced in § 3161(h)(1)(A): *i.e.*, all delays caused by proceedings to determine a defendant's competency are excluded, except for the time during which the defendant is supposed to be in transit, which

is presumptively unreasonable if longer than ten days. *See United Steelworkers of America, Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 202 (6th Cir. 1988) ("[W]e are bound to construe statutes in such a way as to avoid internal conflicts whenever possible[.]").[3]

On November 10, 2005, Tinklenberg was designated to the MCC in Chicago, but did not arrive there until November 30, 2005. Under this Court's precedent, weekends and federal holidays are not included when calculating the ten day time period in which the transportation delays are excluded. *United States v. Bond*, 956 F.2d 628, 632 (6th Cir. 1992) (citing Federal Rule of Criminal Procedure 45(a)). Thus, although twenty calendar days passed until Tinklenberg arrived at the MCC on November 30, 2005, only two non-excludable days lapsed during that time: ten days were excludable under § 3161(h)(1)(F), six days were Saturdays or Sundays, and two days were federal holidays. Accordingly, by the time Tinklenberg arrived at MCC in Chicago, two more non-excludable days had lapsed, for a total of three non-excludable days to date.

The period from November 30, 2005 until March 23, 2006, the day the magistrate judge found Tinklenberg competent, was continuously excludable time, pursuant to § 3161(h)(1)(A). *See Murphy*, 241 F.3d at 456. The next five days were not excludable, bringing the total number of non-excludable days to eight. On March 29,

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[3] The concurring opinion states that the phrase "to or from places of examination" in § 3161(h)(1)(F) "addresses more generally those situations in which a defendant may need to be transported to the hospital for testing," Concurring Op. at 19, but it is surely a leap to read "places of examination" to exclude competency evaluations—the very type of "examination" that a defendant most typically undergoes prior to trial.

2006, excludable time began again, because Tinklenberg filed a motion for an independent psychiatric evaluation on that day. *See* § 3161(h)(1)(A). On April 17, 2006, the magistrate judge granted Tinklenberg's motion and ordered the independent competency evaluation. Time was therefore excludable until June 9, 2006, when the court again found Tinklenberg competent. From June 10, 2006 through July 31, 2006, fifty-two nonexcludable days lapsed, bringing the total number of non-excludable days to sixty.

D. Motions That Do Not Delay Trial

Between August 1, 2006 and August 14, 2006, the date of trial, three motions were filed: on August 1, the government requested permission to conduct a video deposition of a witness, and the court granted the motion on August 3; on August 8, 2006, the government filed a request to bring two guns into the courtroom during the trial as evidence, a request the court granted on August 10, 2006; and on August 11, 2006, Tinklenberg moved to dismiss his indictment, with the district court deny[illegible]g the motion on August 14, prior to the commencement of trial. All of these motions were resolved without a hearing, and without any motion or order to delay the start of trial. Yet in its calculations, the district court excluded from the Speedy Trial period the days in which each motion was filed, pending and resolved.

As previously noted, any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion[]" is excluded from the seventy day Speedy Trial period. 18 U.S.C. § 3161(h)(1)(D). Thus, this Court has held that "[i]f a motion requires a

hearing, the entire time from the filing of the motion through the date of the hearing is excludable." *United States v. Gardner*, 488 F.3d 700, 717 (6th Cir. 2007).

However, this Court has not addressed whether a pretrial motion that does not delay trial, and does not have the potential to cause any such delay, is nevertheless excludable. Every circuit to have addressed the issue appears to have held that the filing of any pretrial motion stops the Speedy Trial clock, regardless of whether the motion has any impact on the trial's start date. *See, e.g., United States v. Wilson*, 835 F.2d 1440, 1443 (D.C. Cir. 1987); *United States v. Hood*, 469 F.3d 7, 10 (1st Cir. 2006); *United States v. Arbelaez*, 7 F.3d 344, 347 (3d Cir. 1993); *United States v. Dorlouis*, 107 F.3d 248, 253-54 (4th Cir. 1997); *United States v. Montoya*, 827 F.2d 143, 151 (7th Cir. 1987); *United States v. Titlbach*, 339 F.3d 692, 698 (8th Cir. 2003); *United States v. Vo*, 413 F.3d 1010, 1015 (9th Cir. 2008); *United States v. Vogl*, 374 F.3d 976, 985 (10th Cir. 2004); *United States v. Miles*, 290 F.3d 1341, 1350 (11th Cir. 2002). Citing this consensus, the government argues that nine days should be excluded in August as a result of the three pretrial motions filed. We disagree, and hold that a pretrial motion must actually cause a delay, or the expectation of a delay, of trial in order to create excludable time.

First, "the starting point in any case involving the meaning of a statute[] is the language of the statute itself." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). The statute provides that "*[t]he following periods of delay* shall be excluded[,]" and then includes among the list of periods of delay "[a]ny period of delay *resulting from* other proceedings

concerning the defendant, including but not limited to" eight different causes of "*delay*[.]" § 3161(h)(1) (emphasis added). One of these excluded delays is "delay *resulting from* any pretrial motion[.]" § 3161(h)(1)(D) (emphasis added). Thus, the statutory exclusion for pretrial motions contained in § 3161(h)(1)(D) and its two prefacatory clauses includes the word "delay" three different times, and twice states that the delay must "result from" the pretrial motion. There is no conceivable way to read this language other than to require a delay to *result* from any pretrial motion before excludable time occurs. Most of the courts that have read this delay requirement out of the statute have not examined the language of the statute closely, although the Eleventh Circuit attempted to explain the statutory basis for its interpretation as follows: "Although . . . [§ 3161(h)(1)(D)] reads 'delay resulting from,' the beginning of Section 3161(h) states that '[t]he following periods of delay shall be excluded . . .' The latter phrase clearly indicates that each period listed in Section 3161(h) automatically is a period of delay." *United States v. Stafford*, 697 F.2d 1368, 1371 (11th Cir. 1983). While the Eleventh Circuit was correct that "each period listed in Section 3161(h) automatically is a period of delay," the court failed to recognize that the "period" listed in § 3161(h)(1)(D) was not "any pretrial motion," but rather, "delay resulting from any pretrial motion[.]" In short, the argument set forth in *Stafford* simply reads words out of the statute to reach its holding. *See Bailey v. United States*, 516 U.S. 137, 146 (1995) (noting that statutes are to be read so as to give each word a "particular, nonsuperfluous meaning").

Because the statute is clear, examining the legislative history is unnecessary. *See Conn. Nat'l Bank v.*

Germain, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (quotations and citations omitted). Nevertheless, it is noteworthy that the legislative history that our sister circuits have cited to support reading the delay requirement out of the statute does not actually support such a reading. Several of these courts have pointed to Congress' rejection of a proposed amendment in 1979 that would have eliminated the automatic exclusions of § 3161(h) in favor of giving judges the discretion to decide whether a particular proceeding warranted excluding time. *See, e.g., United States v. Novak*, 715 F.2d 810, 813 (3d Cir. 1983); *see also Stafford*, 697 F.2d at 1371; *Montoya*, 827 F.2d at 151. Yet Congress' rejection of judicial *discretion* in determining whether an exclusion should apply was not a rejection of the entire delay requirement connected to pretrial motions. Viewing Congress' rejection of a proposed amendment to statutory language as somehow showing an intent to move away from the plain meaning of the statute would be nonsensical; if anything, Congress' rejection of the amendment showed its contentment with the plain language itself. Since Congress left the myriad references to delay in the statute, its intent could only have been that where a pretrial motion or any of the other proceedings listed in § 3161(h) *causes delay*, an exclusion of time is automatic, regardless of the delay's length or reason.

Several courts have also cited the Supreme Court's decision in *Henderson v. United States*, 476 U.S. 321 (1986), as consistent with the proposition that all pre-

trial motions trigger excluded time, regardless of whether they actually cause delay. *See, e.g., United States v. Parker*, 30 F.3d 542, 549 (4th Cir. 1994); *Vogl*, 374 F.3d at 985. Yet *Henderson* held only that under the statute, the time between the filing of a motion and the conclusion of the hearing on that motion is excluded "whether or not a delay in holding that hearing is reasonably necessary." 476 U.S. at 330. In other words, any delay that occurs during the pendency of a pretrial motion, regardless of whether the delay could have been avoided or was due to the court's own inefficiency, is excluded. *Id.* at 326-27. *Henderson* did not address whether time is excluded when no delay occurs at all, and therefore, offers no support for the flawed consensus established by other appellate courts.

Thus, in the absence of any binding precedent to the contrary, this Court will remain faithful to the statutory language and interpret 18 U.S.C. § 3161(h)(1)(D) as excluding the time in which pretrial motions are filed and pending only if they could possibly cause any delay of trial. None of the August 2006 motions caused any delay of the trial, or even threatened to delay the trial. The trial began on August 14, 2006, the date that had been scheduled before the three August motions were filed. Neither the parties nor the district court expressed any intent to delay the trial in response to any of these three motions. Upon the government's filing of its motion on August 1, 2006 to depose a witness by video, the court even ordered that "[t]he parties shall schedule said deposition posthaste so as not to delay trial." (ROA at 115.) In fact, the trial actually began one day *earlier* than the August 15, 2006 trial date the court originally set at the time of its second competency determination.

Excluding time for mundane pretrial motions to allow a gun into the courtroom as evidence and depose a witness by video would frustrate the purpose of the Speedy Trial Act. In the days immediately prior to trial, a litany of evidentiary motions are filed; there is no evidence that Congress intended to eliminate those days from Speedy Trial Act calculations, or intended the government to be able to avoid its responsibility to conduct a timely prosecution simply by filing a flurry of evidentiary motions before trial. Tinklenberg's motion to dismiss, filed on the last business day before trial, did not cause or threaten to cause any delay either; the district court denied the motion the morning of the trial, and the parties proceeded immediately into *voir dire* that morning. In light of the obvious understanding of the parties and the court that the motions filed just before trial would not affect the trial schedule, we will include all thirteen days in August prior to trial in the Speedy Trial Act calculation.[4]

Including these thirteen days, a total of seventy-three non-excludable days lapsed prior to the start of Tinklenberg's trial on August 14, 2006. The Speedy Trial Act was therefore violated, and the district court's denial of Tinklenberg's motion to dismiss is reversed.

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[4] The concurring opinion argues that Tinklenberg did not raise this issue before the district court or on appeal. However, Tinklenberg unquestionably asked both this Court and the court below to count the number of days that had lapsed for the purposes of the Speedy Trial Act; therefore, Tinklenberg adequately preserved the overarching issue presented by this appeal.

II. Disposition

If a defendant is not tried within the required time limit, "the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). "The Speedy Trial Act does not specify whether dismissal should be with or without prejudice, nor does it contain a default presumption one way or the other." *United States v. Robinson*, 389 F.3d 582, 586 (6th Cir. 2004). However, the statute does mandate that, "[i]n determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." § 3162(a)(2).

An analysis of these factors leads us to conclude that Tinklenberg's case should be dismissed with prejudice. To be sure, the first two factors point to dismissal without prejudice. This Court has previously held that one of Tinklenberg's offenses, being a felon in possession of a firearm, is a serious offense favoring dismissal without prejudice. *United States v. Carnes*, 309 F.3d 950, 957 (6th Cir. 2002). There is no evidence that the delay was due to any bad faith on the part of the government, and the defendant's trial began just three days after the seventy day Speedy Trial period expired. *See United States v. Howard*, 218 F.3d 556, 561 (6th Cir. 2000) (finding that absence of prosecutorial bad faith, or of evidence that prosecutor tried to take advantage of delay, was factor supporting dismissal without prejudice); *Carnes*, 309 F.3d at 957 (exceeding of seventy day limit by only eight days supported dismissal without preju-

dice). However, a reprosecution in this case would nevertheless be contrary to the administration of justice because Tinklenberg has already served the entirety of his sentence, as well as his sentence for violating his supervised release, for which he should have been released in July 2009 at the latest.

"In cases where the district court fails to set forth any findings, the appropriate remedy would ordinarily be a remand to the court with instructions to provide findings that are adequate." *Robinson*, 389 F.3d at 588. Yet "'[w]hile the decision is generally the trial court's in the first instance, remand for a hearing is not required if the answer is so clear that no purpose would be served by a remand.'" *Id.* (quoting *United States v. Pasquale*, 25 F.3d 948, 952 (10th Cir. 1994)). This is just such a case. Because no purpose would be served by retrying Tinklenberg for the offenses for which he has already been punished in full, there is no reason to require the district court to hold a hearing on the issue. We will therefore remand, but with instructions that the district court dismiss the case with prejudice.

III. Violation of Supervised Release

Tinklenberg appeals the district court's finding that he violated his supervised release, and further appeals the reasonableness of his fourteen month sentence for the violation. Because his case will be dismissed with prejudice, we dismiss these issues as moot.

CONCLUSION

For the reasons set forth above, we **REVERSE** the district court's denial of Tinklenberg's motion to dismiss, and **REMAND** with instructions that the district court dismiss the indictment with prejudice. Tinklen-

berg's appeals of the finding that he violated his supervised release and his resulting sentence are **DISMISSED** as moot.

CONCURRENCE

JULIA SMITH GIBBONS, Circuit Judge, concurring. I agree that Jason Tinklenberg's trial violated the Speedy Trial Act and concur in all of the majority opinion except for Part I.C. I write separately to clarify my views on several of the difficult issues presented.

First, I agree with the majority that the plain language of § 3161(h)(1)(D) requires us to exclude from the Speedy Trial Act clock the day on which a motion is filed. *See* 18 U.S.C. § 3161(h)(1)(D) (excluding "delay resulting from any pretrial motion, *from* the filing of the motion" (emphasis added)). To the extent that our case law on this point conflicts, the earlier in time disposition controls because a published opinion of this court is binding on subsequent panels. *See United States v. Mastromatteo*, 538 F.3d 535, 545 (6th Cir. 2008). The earliest case I have located, *United States v. Richmond*, 735 F.2d 208, 212 (6th Cir. 1984), held that the day on which a motion is made is "automatically excludable." *Richmond* is both consistent with the statutory language and, absent any prior published opinion of this court to the contrary, controlling. In light of *Richmond*, I concur in the majority's conclusion that the day on which a motion is filed is excludable.

I disagree, however, with the majority's conclusion regarding delays in transportation time to and from a mental competency examination. The Speedy Trial Act

requires that a defendant be brought to trial within seventy days, *see* 18 U.S.C. § 3161(c)(1), subject to certain excludable periods. One such excludable period is any period of "delay resulting from any proceeding, including any examinations, to determine the mental competency . . . of the defendant." 18 U.S.C. § 3161(h)(1)(A). Consequently, all "time associated with mental competency examinations [is] excluded from the Speedy Trial clock." *United States v. Murphy*, 241 F.3d 447, 455-56 (6th Cir. 2001); *see also Henderson v. United States*, 476 U.S. 321, 327 (1986). Here, the period from November 2, 2005, through March 23, 2006, was excludable pursuant to § 3161(h)(1)(A). Notwithstanding the plain language of § 3161(h)(1)(A), however, the majority concludes that § 3161(h)(1)(F) limits the amount of excludable time spent in transportation to a mental competency examination. (Maj. Op. at 9.) I respectfully disagree. Section 3161(h)(1)(F) provides that any "delay [in excess of ten days] resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization . . . shall be presumed to be unreasonable." As is clear from the language of § 3161(h)(1)(F), that provision does not speak to competency proceedings. Rather, it addresses more generally those situations in which a defendant may need to be transported to the hospital for testing. *See, e.g.*, *United States v. Garrett*, 45 F.3d 1135, 1137, 1139-40 (7th Cir. 1995) (defendant transported to hospital for pulmonary testing). Section 3161(h)(1)(A), by contrast, provides a specific exclusion for any time associated with mental competency proceedings. I see no reason why the specific provision of § 3161(h)(1)(A) should be qualified by the more general provision of § 3161(h)(1)(F). *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 405

(6th Cir. 1998). In fact, we reached the same conclusion in *Murphy*. *See* 241 F.3d at 456; *see also United States v. Vasquez*, 918 F.2d 329, 333 (2d Cir. 1990). The defendant in *Murphy* raised the same argument that Tinklenberg raises here, namely, that "a total of ten days can count as excludable time for transportation 'to and from' the place of examination and that any other delay is 'presumed to be unreasonable.'" *Murphy*, 241 F.3d at 455. We rejected this argument:

> We note that Defendant fails to point this Court to any evidence in the record demonstrating the dates upon which he was transported to and from the facility where the examination was conducted or the actual dates that Defendant was admitted or released from the facility. *We also conclude that Defendant's contention is without merit.*

Id. (emphasis added). The majority insists, however, that we did not decide the question in *Murphy* because "the defendant's failure to submit any evidence of the duration of his transportation in support of his argument for a ten-day limitation allowed this Court to reject the defendant's argument without reaching its merits." (Maj. Op. at 9 n.2.) This characterization of *Murphy* is refuted by the language quoted above.

Based on the plain language of the Speedy Trial Act and our prior decision in *Murphy*, I would find all time associated with Tinklenberg's mental competency examination, including transportation time, excludable pursuant to § 3161(h)(1)(A). Tinklenberg entered his initial appearance on October 31, 2005. One day elapsed before Tinklenberg filed a motion for a psychological evaluation to determine his competency to stand trial on November 2, 2005. The district court granted the motion and or-

dered psychological testing. After receiving a written evaluation and holding a competency hearing, the court found Tinklenberg to be competent in an order dated March 23, 2006.[1] Five days elapsed between the court's finding of competency on March 23, 2006, and March 29, 2006, when Tinklenberg filed a motion for an independent psychological examination. The court granted Tinklenberg's motion, received the second written evaluation on June 9, 2006, and made a second finding of competency. Sixty-five additional days elapsed between June 9, 2006, and the start of Tinklenberg's trial on August 14, 2006. By my calculations, a total of seventy-one non-excludable days elapsed between October 31, 2005, and August 14, 2006—one day beyond what the Speedy Trial Act allows. *See* 18 U.S.C. § 3161(c)(1).

As to motions that do not delay the start of trial, several prudential considerations would prevent me from reaching the issue. First, it appears to be waived. Tinklenberg has not raised it in his appellate brief, a fact that ordinarily precludes our review. *See Carter v. Univ. of Toledo*, 349 F.3d 269, 272 (6th Cir. 2003). Nor did he raise it in his August 11, 2006, Speedy Trial Act

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[1] Although not dispositive in this case, I note that the court actually concluded that Tinklenberg was competent at the hearing held on the previous day. We have held, albeit in an unpublished disposition, that the § 3161(h)(1)(A) proceeding to determine the mental competency of the defendant is complete "when, after a competency hearing[,] the court declare[s the defendant] competent to stand trial." *United States v. Moore*, 961 F.2d 1579 (table), 1992 WL 92740, at *5 (6th Cir. 1992) (per curiam). That is, the day on which the court makes a finding of competency, rather than the day on which the written order of competency is docketed, should control the Speedy Trial Act clock. Here, the difference of one day does not affect my conclusion that the Speedy Trial Act was violated.

motion to the district court. *See Molina-Crespo v. U.S. Merit Sys. Prot. Bd.*, 547 F.3d 651, 662 (6th Cir. 2008). To the contrary, in his motion for reconsideration in the district court, Tinklenberg apparently accepted the proposition that certain days in August of 2006 were properly excluded pursuant to § 3161(h)(1)(D) although they did not delay trial. Second, I would not penalize the government and the district court for acting, in the absence of any controlling authority, upon the quite reasonable assumption that our circuit would align with the others to have considered the issue in finding those days to be excludable. Nevertheless, because the majority reaches the issue, I note my agreement with the majority's reading of § 3161(h)(1)(D) as a matter of statutory interpretation. After today, district courts should not exclude from the Speedy Trial clock days that are consumed by motion practice but that do not cause actual delay.

I agree, therefore, that the Speedy Trial Act was violated. Whether Tinklenberg's indictment should be dismissed with or without prejudice presents a closer question. As the majority acknowledges, several of the statutory factors point toward dismissal without prejudice. *See* 18 U.S.C. § 3162(a)(2). There is no suggestion of improper behavior on anyone's part. Rather, "the district court's error in this case was a good-faith misinterpretation of the Speedy Trial Act's requirements that resulted in a relatively short delay of the trial." *See United States v. Howard*, 218 F.3d 556, 561 (6th Cir. 2000). Neither the government nor the district court could have been expected to anticipate our disagreement with the other ten circuits to have considered the § 3161(h)(1)(D) issue. Moreover, a dismissal with prejudice may have a negative impact on the administration

of justice, *see* § 3162(a)(2), in that the instant offense will be erased from Tinklenberg's record. Should Tinklenberg be prosecuted again in the future, his record will not reflect the true extent of his criminal history. Despite these concerns, I agree that retrying Tinklenberg would be a poor use of government resources and serve no worthwhile purpose. I therefore join the majority in finding that dismissal with prejudice is warranted.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Aug. 14, 2006

ORDER

This matter is before the Court on Defendant Jason Louis Tinklenberg's Motion to Dismiss Based on Violation of the Speed Trial Act. Upon careful review, the Court will deny Defendant's Motion.

The Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-74, generally requires a federal criminal trial to begin 70 days after a defendant is charged with a crime or has made an initial appearance. *Id.* § 3161(c)(1). If the defendant's trial does not begin within the Act's 70-day window, he may move, before the start of the trial or entry of a guilty plea, to dismiss the charge against him. *Id.* § 3162(a)(2). If timely and in satisfaction of his burden of proof, the trial court must grant the defendant's motion. *Id.* The Act, however, recognizes that delay is

often the product of unavoidable events and allows for certain periods to be excepted from the 70-day trial clock. To that end, the Act embodies a long and detailed list of specific circumstances that are excluded from speedy trial computation.[2] *See id.* § 3161(h).

In this case, Defendant made his initial appearance before the Court on October 11, 2005. Defendant next appeared on November 2, 2005, at which time Defense counsel orally moved to compel Defendant to undergo a forensic psychiatric evaluation. Defendant's Motion was granted that day and Defendant's speedy trial clock stopped. 18 U.S.C. § 3161(h)(1)(A). Thus far, one speedy trial day had elapsed.

Defendant's speedy trial clock resumed on March 23, 2006, when the Court ordered Defendant competent to stand trial pursuant to 18 U.S.C. § 4241(d). On March 29, 2006, Defendant moved for an independent psychiatric evaluation and stopped his speedy trial clock. *Id.* § 3161(h)(1)(F). Thus far, six speedy trial days had elapsed. The Court granted Defendant's Motion for an independent psychiatric evaluation on April 17, 2006, at which time his speedy trial clock restarted. On April 26, 2006, Defendant moved to appoint new counsel and his speedy trial clock stopped. *Id.* Thus far, 14 days had elapsed off Defendant's speedy trial clock.

On May 9, 2006—and with his speedy trial clock still tolled—Defendant's counsel moved to withdraw. On June 9, 2006, the Court granted Defendant's Motion for New Counsel and permitted Defendant's existing coun-

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[2] In calculating periods of time under the Speedy Trial Act, "the day of the act or event from which the designated period of time begins to run shall not be included." FED. R. CRIM. P. 45(a).

sel to withdraw. Defendant's speedy trial clock resumed June 9, 2006. Defendant's clock did not stop again until August 1, 2006, when Plaintiff moved to take a video deposition of its witness. *Id.* Thus far, sixty-six speedy trial days had elapsed. Plaintiff's Motion to take a video deposition was granted on August 3, 2006, and Defendant's speedy trial clock restarted that day.

On August 8, 2006, Plaintiff moved for permission to store a firearm (evidence in this case) in a federal courthouse, which tolled Defendant's speedy trial clock. *Id.* Thus far, 69 days had elapsed from Defendant's speedy trial clock. The Court granted Plaintiff permission to store a firearm in the courthouse on August 10, 2006, and Defendant's speedy trial clock was poised to resume when Defendant filed the instant Motion to Dismiss Based on Violation of the Speed Trial Act on August 11, 2006, which tolled his speedy trial clock. *Id.* Thus, it appears by virtue of filing the instant Motion, Defendant has effectively denied himself the relief he sought under the Speedy Trial Act.[3]

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[3] Defendant's speedy trial calculations and belief that his 70-day period have expired fail to account for the excluded periods from August 1, 2006, to August 3, 2006, and August 8, 2006, to August 10, 2006. Any motion filed with the Court tolls Defendant's speedy trial clock. *United States v. Hohn*, 8 F.3d 1301, 1304-06 (8th Cir. 1993); *see also United States v. Levon*, 127 Fed. Appx. 865, 870 (6th Cir. 2005).

THEREFORE, IT IS HEREBY ORDERED that Defendant Jason Louis Tinklenberg's Motion to Dismiss Based on Violation of the Speed Trial Act (Dkt. No. 74) is **DENIED**.

/s/ RICHARD ALAN ENSLEN
RICHARD ALAN ENSLEN
SENIOR UNITED STATES
DISTRICT JUDGE

DATED in Kalamazoo, MI:
Aug. 14, 2006

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Aug. 15, 2006

ORDER

This matter is before the Court on Defendant Jason Louis Tinklenberg's Motion for Reconsideration of the Court's August 14, 2006 decision to deny his Motion to Dismiss Based on Violation of the Speed Trial Act. To prevail on the instant Motion, Defendant must not only demonstrate that the Court's decision suffers from a palpable defect, but must also show that a different result is manifest. W.D. Mich. LCrR 47.3(a). "[M]otions for reconsideration that merely present the same issues ruled upon by the Court shall not be granted." *Id.*

Defendant advances three grounds for reconsideration, the first being that the Court erroneously excluded the day on which motions were filed from his speedy trial calculus. In regard to whether a defendant's spee-

dy trial clock stops the day the motion is filed or the day after, there appears to be a split of authority amongst panels of the Sixth Circuit Court of Appeals. *Cf. Greenup v. United States*, 401 F.3d 758, 766 (6th Cir. 2005) (filing of a motion stops speedy trial clock that day); *United States v. Cope*, 312 F.3d 757, 777 (6th Cir. 2002) (same); *United States v. Tinson*, 23, F.3d 1010, 1012 (6th Cir. 1994) (same); *United States v. Moran*, 998 F.2d 1368, 1370 (6th Cir. 1993) (same) *United States v. Culpepper*, 898 F.2d 65, 67 (6th Cir. 1990) (citing *United States v. Papaleo*, 853 F.2d 16, 21 (1st Cir. 1988) ("both the date on which the motion is filed and the date on which the court disposes of the motion are part of this excludable period.")) *with United States v. Thomas*, 49 F.3d 253, 256 (6th Cir. 1995) (filing of motion does not stop speedy trial clock until the following day); *United States v. Bowers*, 834 F.2d 607, 609 (6th Cir. 1987) (same).

Given the Circuit split, the Court is left with the plain language of the Speedy Trial Act. Under 18 U.S.C. § 3161(h)(1)(F,) any "delay resulting from any pretrial motion, *from the filing of the motion* through the conclusion of the hearing on, or other prompt disposition of, such motion" is excluded. (emphasis supplied). Given that the Act unambiguously provides that the moment a motion is filed a defendant's speedy trial clock stops, the Court discerns no reason to resort to the case law. Thus, the Court believes its exclusion of the days upon which motions were filed in this case was proper under the Speedy Trial Act and will deny Defendant's Motion for Reconsideration on that ground.

Defendant also contends the Court incorrectly tabulated his speedy trial clock concerning an August 3, 2006

Order, when it commented that "Defendant's speedy trial clock restarted that day." (Aug. 14, 2006 Order 2). Under Federal Rule of Criminal Procedure 45(a) "the day of the act or event from which the designated period of time begins to run shall not be included." The Court specifically noted this in its Order and calculated periods consistent with Rule 45(a). Accordingly—and to avoid injecting superfluous dates into an already confusing speedy trial calculus—August 3, 2006, was mentioned as the necessary triggering event, but not included against Defendant's speedy trial clock. Defendant's Motion for Reconsideration on this score will be denied.[1]

Finally, Defendant argues that the Court erred by failing to properly account for the time he spent in excess of ten days traveling en route to a psychological examination. On November 2, 2005, Defendant was ordered to undergo a forensic psychiatric evaluation and his speedy trial clock stopped. 18 U.S.C. § 3161(h)(1)(A). Defendant's speedy trial clock did not start again until March 23, 2006, when the Court ordered Defendant competent to stand trial. The travel periods from November 10, 2005, to November 30, 2005, are irrelevant because Defendant's clock was already stopped pursuant to section 3161(h)(1)(A). *See United State v. Murphy*, 241 F.3d 447, 455-56 (6th Cir. 2001) (citing other circuit courts of appeals that held that the

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[1] Furthermore, even under Defendant's calculations, he arrives at the 70th day being August 11, 2006, and presumes the speedy trial clock to have expired. Defendant, however, filed his Motion to Dismiss based on speedy trial grounds on Friday, August 11, 2006, and tolled the speedy trial clock for the reasons articulated above. The Motion was not decided until Monday, August 14, 2006, at which time Defendant's trial had begun.

section 3161(h)(1)(A) exclusion begins when a motion to determine competency is filed and ends when competency hearing is concluded). Defendant's Motion for Reconsideration on this basis will be denied.

THEREFORE, IT IS HEREBY ORDERED that Defendant Jason Louis Tinklenberg's Motion for Reconsideration (Dkt. No. 79) is **DENIED**.

/s/ RICHARD ALAN ENSLEN
RICHARD ALAN ENSLEN
SENIOR UNITED STATES
DISTRICT JUDGE

DATED in Kalamazoo, MI:
Aug. 15, 2006

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 06-2646 & 08-1765

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

JASON LOUIS TINKLENBERG, DEFENDANT-APPELLANT

[Filed: Jan. 12, 2010]

ORDER

Before: KEITH, CLAY, and GIBBONS, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN
Clerk

APPENDIX E

SPEEDY TRIAL ACT
18 U.S.C. § 3161(h)

CURRENT VERSION
EFFECTIVE OCTOBER 13, 2008

1. Section 3161(h) of Title 18 of the United States Code provides in pertinent part:

Time limits and exclusions

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are un-

known and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the

court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

SPEEDY TRIAL ACT
18 U.S.C. § 3161(h)

PRIOR VERSION
EFFECTIVE THROUGH OCTOBER 12, 2008

2. Until October 13, 2008, Section 3161(h) of Title 18 of the United States Code provided in pertinent part:

Time limits and exclusions

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom

the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

OPPOSITION BRIEF

No. 09-1498

IN THE
SUPREME COURT OF THE UNITED STATES

United States of America,

Petitioner,

v.

Jason Louis Timkenberg,

Respondent.

On Petition of a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the time between the filing and disposition of pretrial motions that the parties and the court know from the time of filing "do[] not have the potential to cause any . . . delay," Pet. App. 16a, must be excluded from the deadline for commencing trial under the Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(1)(D) (Supp. 2008).

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BRIEF IN OPPOSITION

Respondent Jason Tinklenberg respectfully requests that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

A. District Court Proceedings

In 2005, the government charged respondent Jason Tinklenberg in an indictment in the Western District of Michigan with one count of being a felon in possession of a firearm and two counts of possessing items used to manufacture methamphetamine. His initial appearance before a magistrate occurred on October 31, 2005.

After the initial appearance, the case did not move in a timely fashion, especially with respect to two competency evaluations that the district court ordered. Although the district court initially ordered the first evaluation to be completed within a period "not to exceed thirty days," CA6 ROA 36, it took several months to arrange and to be conducted. A second evaluation also took several weeks. Pet. App. 4a. The district court eventually found Tinklenberg competent to stand trial.

On July 25, 2006, the district court set the case for trial on August 14, 2006. Pet. App. 4a. In early August, the government made two "mundane," administrative motions – one to bring the gun it had seized into the courtroom as evidence at trial, and another to depose a witness who could not attend trial – that the parties and the court understood "would not affect the trial schedule." Pet. App. 20a. The district court quickly disposed of the motions, granting them both.

On Friday, August 11, the last business day before trial, Tinklenberg moved to have the indictment dismissed on the ground that the 70 day period under the Speedy Trial Act for commencing trial had expired (or would expire before trial). There is no dispute that from Tinklenberg's initial appearance through July 31, 2006, at least 60 non-excludable days expired. Pet. 6; Pet. App. 15a. Nor is there any dispute that 4 more days elapsed from August 4 through August 7, 2005, when no pretrial motions were pending and there was nothing else going on. *Id.*; *see also* Pet. App. 31a. Thus, a total of at least 64 non-excludable days unquestionably elapsed before Tinklenberg filed his motion.[1]

There are three independent reasons why at least seven more days should arguably be included in the calculation, thus causing a violation of the Act. First, nine days in August elapsed while the government's two pretrial motions and Tinklenberg's Speedy Trial motion – motions that the parties knew would not delay trial – were pending. Second, ten days in excess of the ten day statutory allotment under § 3161(h)(1)(F) for transporting defendants to and from examination elapsed while the government was transporting Tinklenberg for his competency evaluations. Third, several weeks in excess of the 30 day time period under 18 U.S.C. § 4247(b) for conducting competency evaluations elapsed before Tinklenberg was evaluated.

[1] The trial court found the 69 days elapsed. Pet. App. 7a, 31a, during these periods, whereas the Sixth Circuit found that 64 days elapsed. Pet. App. 15a. This difference is immaterial because each of Tinklenberg's three arguments for adding additional time to the Speedy Trial clock would add more than seven days.

[2] Like the government, Tinklenberg will cite to the current version of the Act unless otherwise noted.

On August 11, 2005, the district court rejected Tinklenberg's Speedy Trial objection. Pet. App. 29a-32a; see also Pet. App. 33a-36a (denying Tinklenberg's motion for reconsideration on the issue).

Tinklenberg proceeded to trial on August 14, 2006. A jury convicted him of all three charges. The district court sentenced him to 33 months in prison, to be followed by three years of supervised release.

B. Court of Appeals Proceedings

The Sixth Circuit reversed the district court's Speedy Trial determination. The court found that time in which pretrial motions were pending in early August should not be excluded. The plain language of Section 3161(h)(1)(D), the court of appeals explained, excludes the time only during which those pretrial motions that cause, or at "have the potential to cause," delay are pending. Pet. App. 16a. "In light of the obvious understanding of the parties and the court that the motions filed just before trial would not affect the trial schedule," the nine days during which they were pending were properly includable under the Speedy Trial clock.

The Sixth Circuit partially rejected Tinklenberg's two alternative arguments. First, the Sixth Circuit agreed with Tinklenberg that under § 3161(h)(1)(F), time beyond ten days for transporting defendants to and from competency examinations is presumptively unreasonable. Pet. App. 13a. But, following circuit precedent, the Sixth Circuit further held that that ten day period incorporated former Fed. R. Crim. P. 45(a) thereby excluding weekends and federal holidays from the period. Pet.

App. 11a (citing *United States* v. *Bond*, 956 F.2d 628, 632 (6th Cir. 1992)).[3] "Thus, although twenty calendar days passed" while Tinklenberg was being transported, the court of appeals held that "only two non-excludable days lapsed during that time: ten days were excludable under § 3161(h)(1)(F), six days were Saturdays or Sundays, and two days were federal holidays." Pet. App. 11a.

Second, the Sixth Circuit held, again following circuit precedent, that the 30 day limit under § 4247(b) for conducting competency evaluations "does not limit the time period for a competency examination with respect to calculations under the Speedy Trial Act." Pet. App. 12a (quoting *United States* v. *Murphy*, 241 F.2d 447, 456 (6th Cir. 2001)).

The Sixth Circuit's ruling resulted in a finding that the statutory Speedy Trial Act had been violated. Because Tinklenberg had served his complete sentence, and had served the majority of his supervised release, the court ordered the case dismissed with prejudice. Pet. App. 21a-22a.

The government filed a petition seeking rehearing en banc. The Sixth Circuit denied the petition without any judges requesting a vote on it. Pet. App. 37a.

[3] At relevant times, Rule 45(a) provided that weekends and federal holidays did not count when calculating a period of time of less than 11 days. The Rule was amended in 2009 to dispense with the exclusion of weekends and holidays. See *infra* at 15 n.5.

REASONS FOR DENYING THE WRIT

I. The Sixth Circuit's Holding Is Narrow and Correct.

The government claims that the Sixth Circuit held that "pretrial motion delay is excludable [under 18 U.S.C. § 3161(h)(1)(D)] only if the motion actually causes a postponement, or the expectation of a postponement, of the trial." Pet. 8. But the court of appeals' actual holding in this case was actually much narrower. The Sixth Circuit held that the time while pretrial motions were pending was non-excludable not simply because there was no actual postponement or "expectation of postponement" of trial, but rather because of the affirmative "understanding of the parties and the court that the motions . . . would not affect the trial schedule." Pet. App. 20a. Thus, the motions here did not even have "the potential to cause any such delay." Pet. App. 16a.

The specific facts of this case illuminate the narrowness of the Sixth Circuit's holding. On July 25, 2005, the trial court told the parties that the case would go to trial on August 14, 2006. Pet. App. 1a. When the three motions at issue were filed in early August, the trial court advised the parties to handle them "so as not to delay trial." Pet. App. 19a; *see also id.* ("Neither the parties nor the district court expressed any intent to delay the trial in response to any of these three motions.") Indeed, the whole point of the government's motion to depose an essential witness who would be unavailable for trial was to preserve testimony in light of the fact that the trial date was fixed. Tinklenberg agreed that "the trial should [not] be delayed due to lack of [the] witness." CA6 ROA 111. Thus, the parties knew from the outset

of this filing, as well as the other two motions, that trial was scheduled for August 14 and that the motions would have no effect whatsoever on that schedule. "In light of the obvious understanding of the parties and the court that the motions filed just before trial would not affect the trial schedule," the Sixth Circuit refused to exclude under Section 3161(h)(1)(D) the time during which they were pending. Pet. App. 20a.

This holding comports with the text and purpose of the Speedy Trial Act. Section 3161(h)(1)(D) excludes "[a]ny period of delay resulting from other proceedings concerning the defendant, including . . . delay resulting from any pretrial motion, from the filing of the motion through [its disposition]." As the Sixth Circuit explained, the plain language of this provision requires that the filing of a pretrial motion somehow cause some "delay," or at least "have the potential to cause . . . delay," in order to exclude the time while it is pending. Pet. App. 16a-17a. If the parties know from the moment that pretrial motions are filed that they will not affect the scheduled trial date, it is impossible to say that any delay "result[s] from" the motions.

The government protests that this outcome is "arbitrary," "formalistic," and contrary to "the Act's purpose." Pet. 11, 16. But "statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly v. Dollar Park & Fly*, 469 U.S. 189, 194 (1985). And "[u]nder this Court's precedents," when the meaning of the statutory language is clear, that is also "the

end" of its analysis. *Zuni Public Sch. Dist. v. Dept. of Educ.*, 550 U.S. 81, 93 (2007). "It is not for [this Court] to rewrite the statute so that it covers only what [it] think[s] is necessary to achieve what [it] think[s] Congress really intended." *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010).

In any event, it is the government's position, not the Sixth Circuit's holding, that contravenes the goal of the Speedy Trial Act. The purpose of the Act purpose is to "vindicate the public interest in the swift administration of justice" by "ensuring speedy trials." *Bloate v. United States*, 130 S. Ct. 1345, 1355-56 (2010); *accord Zedner v. United States*, 547 U.S. 489, 502 (2006). Here, there is no question that if no pretrial motions had been filed in the days leading up to Tinklenberg's trial, the Act's clock would have expired before trial commenced. It is thus would be utterly arbitrary and formalistic to allow the mere filing of "mundane" motions that everyone knew would not delay trial to excuse an otherwise unquestionable Speedy Trial Act violation. Pet. App. 20a. Indeed, allowing such motions always to toll the Speedy Trial clock would encourage the government to file pre-trial motions to frustrate the purpose of the Act. *Cf. United States v. Brown*, 285 F.3d 959, 962 (11th Cir. 2002) ("If the government could extend the seventy day period merely by filing a request to set a trial date, or if the court could ignore its obligation to set a timely trial date, there would be nothing left of the requirements of § 3161(h)(8) and no teeth in the Speedy Trial Act as a whole.")

Nor, contrary to the government's contention, Pet. 10-11, does the Sixth Circuit's holding contravene this Court's decision in *Henderson v. United States*, 476 U.S. 321

(1986). *Henderson* held that any delay caused by pretrial motions must be excluded under Section 3161(h)(1)(D), regardless of whether the "delay . . . is reasonably necessary." 476 U.S. at 330. The Court in *Henderson*, in other words, took it as a given that the pretrial motions had delayed trial. Thus, as the Sixth Circuit recognized, "*Henderson* did not address whether time is excluded *when no delay occurs at all* because the parties know from the outset that the motions will not affect the trial schedule." Pet. App. 19a (emphasis added).

To the extent that this Court has addressed *that* question, it strongly suggested just last Term in *Bloate* v. *United States*, 130 S. Ct. 1345 (2010), that such time should *not* be excluded. *Bloate* held that time that a district court grants to a party to prepare pretrial motions is not excludable under Section 3161(h)(1)(D). In the course of that holding, this Court instructed that Act's focus on "delay" means what its plain language says: "Section 3161(h) specifies the types of *delays* that are excludable." 130 S. Ct. at 1354 (emphasis added); *see also id.* at 1352 ("The eight subparagraphs in subsection (h)(1) address the automatic excludability of *delay generated* for certain enumerated purposes.") (emphasis added). Subparagraph (h)(1)(D) follows this mold: it "governs the automatic excludability of *delays* 'resulting' *from* . . . proceedings involving pretrial motions." 130 S. Ct. at 1352 (emphasis added). Thus, as both the majority and dissent in *Bloate* intoned, "delays" – not simply all periods of time while motions are pending – "are excludable" under subparagraph (h)(1)(D). 130 S. Ct. at 1354 (emphasis added); *see also id.* at 1361 (Alito, J., dissenting) ("delay 'resulting from' a pretrial motion is delay that

occurs as a consequence of such a motion"). A contrary rule, the Court suggested, would "threaten the Act's manifest purpose of ensuring speedy trials by construing the Act's automatic exclusion exceptions in a manner that could swallow the 70-day rule." 130 S. Ct. at 1355.

II. The Sixth Circuit's Holding On The Facts Of This Case Does Not Conflict With Any Decision From Any Other Court of Appeals.

The government claims that the Sixth Circuit's decision conflicts with decisions from all eleven other federal circuits that hear criminal cases. Stated at a high level of generality, it is true, as the Sixth Circuit acknowledged, that other circuits have held that "the filing of any pretrial motion stops the Speedy Trial clock," regardless of whether the motion turns out to affect the trial's start date. Pet. App. 16a. But none of those decisions addressed the particular situation at issue here, in which there was an "obvious understanding of the parties and the court that the motions filed just before trial would not affect the trial schedule." Pet. App. 20a. Even if a court holds that it will not conduct *post hoc* inquiries into whether motions actually delayed trial, there would be good reason to distinguish the general, typical situation in which the parties do not know whether a motion will delay trial (and thus must assume that it has the potential to do so) from the situation in which the parties know from the moment a motions is filed that it "does not have the potential to cause any such delay." Pet. App. 16a.

Indeed, three circuits have already suggested that they would distinguish between those situations and agree with the Sixth Circuit's holding here. In

United States v. *Gambino*, 59 F.3d 353 (2d Cir. 1995), the Second Circuit confronted a case in which a district court had tabled a pretrial motion, allowing it to remain pending until trial was complete. Although the Second Circuit generally excludes time while pretrial motions are pending even when the motions do not cause actual delay, *see United States* v. *Cobb*, 697 F.2d 38, 42 (2d Cir. 1982), it refused to exclude the time during the motion's pendency under Section 3161(h)(1)(D). *Gambino*, 59 F.3d at 359. The Second Circuit explained that "Congress envisioned that the speedy trial clock be tolled when the expenditure of judicial resources to decide the motion would interfere with the case expeditiously proceeding to trial, and not tolled when the postponement of a pretrial motion until after trial does not affect a trial court's ability to proceed." *Id.* Because the motion did not "consume the court's time and attention," it did not give rise to excludable time. *Id.*

The Ninth Circuit reached the same conclusion on the same basic facts in *United States* v. *Clymer*, 25 F.3d 824, 830 (9th Cir. 1994). In words strongly resembling the Sixth Circuit's reasoning here, the Ninth Circuit held that time may be may be excluded under Section 3161(h)(1)(D) "only when [delay] in some way results from the pendency of the motion." *Id.* The Ninth Circuit has adhered to this holding, even while later adopting the same general rule that the Second Circuit has adopted. *See United States* v. *Vo*, 413 F.3d 1010, 1014-15 (9th Cir. 2005). The First Circuit has also recognized the distinction between motions that are capable of causing delay and those that are not, suggesting it might agree with the Second and Ninth Circuits. *See United States* v. *Salimonu*, 182 F.3d 63, 68-69 (1st Cir. 1999).

In short, it is not at all clear that any other circuit would reject the Sixth Circuit's holding on the facts here. Nor is it clear that the Sixth Circuit would reject the general rule followed by other circuits. Only by allowing further percolation will this Court be able to find out whether a conflict truly exists.[1]

III. There Is No Need To Address The Question Presented Now; Indeed it Would be Premature to Do So.

It appears to be quite unusual for the parties to have a clear understanding from the moment a pretrial motion is filed that the motion does not even have the potential to delay proceedings in any way. But even if the scenario did arise with sufficient frequency such that the question of whether apply Section 3161(h)(1)(D) in such circumstances were an issue of sufficient importance to warrant this Court's attention, there are three reasons why there would be no need to address the issue in this case. Indeed, it would be premature to consider the issue now.

First, Tinklenberg has already served "the entirety of his [prison] sentence" and a portion of the 3-year term of supervised release the district court imposed. Pet. App. 22a; *see also* Pet. 7 n.3. Thus, little additional punishment would accomplished by reinstating Tinklenberg's convictions.

Second, allowing further percolation would not appear to threaten any other pending prosecutions. The government asserts that review is necessary because the

[1] A case is currently pending in the Seventh Circuit, for example, in which a defendant is asking the Court to adopt the reasoning of *Tinklenberg*. *See* Brief for Appellate Tylman at 17–19, *United States v. Hills et al* (7th Cir. Nos. 09-2151, 09-2152, 09-2153), *available at* 2010 WL 5411413; *with* Brief for the United States at 19-21, *United States v. Hills et al* (7th Cir. Nos. 09-2151, 09-2152, 09-2153) No. 09-2151 (7th Cir.), *available at* 2010 WL 2665103.

Sixth Circuit's decision "complicates" litigation concerning pretrial motions and will "produce great uncertainty" under the Act. Pet. 16. But the government does not cite any actual cases or empirical facts to support its claims; nor does it cite a single indictment that has been dismissed pursuant to *Tinklenberg*.

Indeed, the facts that are available suggest the opposite of what the government asserts. The Sixth Circuit's decision has been on the books for almost one year, and district courts in the Sixth Circuit appear to be administering *Tinklenberg* without any difficulty whatsoever. Several decisions are available that advise the parties after motions are filed whether the motions will delay trial and thus toll the Speedy Trial clock. *See United States* v. *Jerdine*, 2009 WL 1906964, at *5 (N.D. Ohio 2009) ("The Court finds that Mr. Jerdine's motions are complex in nature and that the time required to rule upon these motions causes a delay of the trial and, thus, creates excludable time."); *United States* v. *Sutton*, 2009 WL 5196592, at *1 (E.D. Tenn. 2009) (same); *United States* v. *Abernathy*, 2009 WL 1506417, at *3-4 (E.D. Mich. 2009) (same); *United States* v. *Mayes*, 2009 WL 1784000, at *1 (E.D. Tenn. 2009) (same).

To the extent that the government further urges review based on its speculation that the "logic" of the Sixth Circuit's decision "could" lead to other problematic holdings concerning other parts of the Act, Pet. 17, it suffices for now to say that no court has issued any such holdings. As with the government's other predictions, there is no reason not to wait and see what happens. If any problems arise down the

road, the government can seek review at that point and this Court can decide, based on actual case law, whether to grant review.

Third, it would be especially premature for this Court to step in now because the circuits here not yet have had an opportunity to reassess their Section 3161(h)(1)(D) jurisprudence in light of this Court's recent decision in *Bloate*. As explained above, *Bloate*'s reasoning strongly supports the Sixth Circuit's decision. *See supra* at 8-9. Indeed, *Bloate*'s insistence of giving effect to the plain language of the Act abrogated the law in eight circuits that, unlike the Sixth Circuit here, had departed from the statutory text. *See* 130 S. Ct. 1351 n.5, 1354. This Court's customary practice is to allow lower courts an opportunity to absorb its new decisions before sweeping in to revisit statutory subjects it has just addressed. There is every reason to follow that practice here.

IV. Even if this Court Reversed the Sixth Circuit's Holding Regarding The Pretrial Motions, It Would Still Be Required to Find a Speedy Trial Act Violation.

This case also presents a poor vehicle for addressing the pretrial motion excludability rule in Section 3161(h)(1)(D) because regardless of whether any time during which the August motions were pending should be included in the Speedy Trial calculation, the Act was violated here for two other independent reasons.

First, all 10 days beyond the 10 *calendar* days that elapsed while the government was transporting Tinklenberg for competency determinations should have been included in Tinklenberg's Speedy Trial calculation. Section 3161(h)(1)(F) presumes that "any time consumed in excess of ten days from the date of . . . an order directing

transportation" to and from a place of "examination" is unreasonable and therefore non-excludable. 18 U.S.C. § 3161(h)(F); *see* Pet. App. 12a-13a. Relying on circuit precedent, the Sixth Circuit held that this ten-day period for transportation incorporated former Fed. R. Crim. P. 45(a), which provided that any time period "specified in [the Rules of Criminal Procedure, any local rule, or any court order" that was less than 11 days should exclude weekends and federal holidays. Pet. App. 14a (citing *United States* v. *Bond*, 956 F.2d 628, 632 (6th Cir. 1992)). Thus, the Sixth Circuit included only 2 of the excess 10 calendar days in Tinklenberg's calculation.

This was a legal error. As other courts have held, the "time exclusion [in former Rule 45(a)] for weekends and holidays applies to 'any period of time specified in these rules, any local rule, or any court order,' the Rule omits application of the exclusion of times specified by statute[]. Therefore, . . . [a] court [should] not exclude weekends and holidays in calculating the ten-day period to transport a defendant." *United States* v. *Williamson*, 409 F. Supp. 2d 1105, 1107 n.1 (N.D. Iowa 2006); *see also United States* v. *Collins*, 90 F.3d 1420 (9th Cir. 1996) (not excluding weekends or holidays under Section 3161(h)(1)(F)); *United States* v. *Noone*, 913 F.2d 20, 25 (1st Cir. 1990) (same); *United States* v. *Castle*, 906 F.2d 134, 137 (5th Cir. 1990) (same). Indeed, applying former Rule 45(a) to this situation would violate the Rules Enabling Act, 28 U.S.C. § 2072, which specifies that the Rules of Criminal Procedure may not "abridge . . . or modify any substantive right," including the right to speedy trial provided in

the Speedy Trial Act. *See United States v. Orenchuk*, 357 F.3d 1082, 1093 n.13 (9th Cir. 2004).

Second, the Sixth Circuit should not have excluded the time beyond 30 days that elapsed with respect to respondent's competency evaluations. As the Sixth Circuit acknowledged, 18 U.S.C. § 4247(b) provides that competency examinations such as the ones at issue here must be completed within 30 days. Pet. App. 11a. Thus, in crafting the exclusion in Section 3161(h)(1)(A) of the Speedy Trial Act for competency examinations, Congress would have presumed that no delays respecting such examinations would, or could, run more than the 30 days allowed in 18 U.S.C. § 4247(b).

The Sixth Circuit and other courts have declined to incorporate this 30-day limit into the Act's excludable-day rules. Pet. App. 12a. But either the Act incorporates counting mechanisms found in other statutes in rules or it does not. If it does, then the several weeks beyond the 30-day time period for conducting Finklenberg's competency examinations cannot be excluded. If, however, the Act does not incorporate outside statutes and rules, then former Rule 45(a) should not have applied here. Either way, the Sixth Circuit should have included more than seven

Even though the Sixth Circuit's decision conflicts with these holdings, there would be nothing to gain by resolving this conflict. Rule 45(a) was amended in 2009 to dispense with the previous requirement of excluding Saturdays, Sundays, and holidays for time periods shorter than 11 days. *See* Fed. R. Crim. P. 45(a)(1)(B). Thus, it no longer matters whether Rule 45(a) applies to Section 3161(h)(1)(F)'s 10-day transportation rule.

additional days in Tinklenberg's Speedy Trial calculation. The Act was thus violated irrespective of the Sixth Circuit's pretrial motions holding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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No. 09-1498

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JASON LOUIS TINKLENBERG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 09-1498

UNITED STATES OF AMERICA, PETITIONER

v.

JASON LOUIS TINKLENBERG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In the decision below, the Sixth Circuit acknowledged that it was creating a circuit conflict on the scope of the exclusion for "delay resulting from any pretrial motion" from the deadline for commencing trial under the Speedy Trial Act of 1974 (STA), 18 U.S.C. 3161(h)(1)(D). Pet. App. 16a. "[D]isagree[ing]" with the "consensus" of "[e]very circuit to have addressed the issue," the court "h[e]ld that a pretrial motion must actually cause a delay, or the expectation of a delay, of trial in order to create excludable time." *Ibid.* As the petition for a writ of certiorari explains, this Court's review is needed to resolve the conflict and correct the Sixth Circuit's erroneous decision, which is already disrupting operation of the STA and threatens further disruption if uncorrected. Respondent's arguments against granting review are unpersuasive.

A. The Decision Below Creates A Circuit Conflict

Respondent attempts (Br. in Opp. 5-6, 9-11) to make the circuit conflict disappear by arguing that the Sixth Circuit held only that time is not excluded when "the parties know from the moment that pretrial motions are filed that they will not affect the scheduled trial date." *Id.* at 6. But respondent's characterization of the holding is not accurate. And even if it were, the decision below would still conflict with decisions of other circuits.

1. The court below clearly stated that it was "hold[ing] that a pretrial motion must actually cause a delay, or the expectation of a delay, of the trial in order to create excludable time." Pet. App. 16a. And that is how district courts in the Sixth Circuit are interpreting the decision, as the cases cited by respondent (Br. in Opp. 12) illustrate. See *United States* v. *Sutton*, No. 3:09-CR-139, 2009 WL 5196592, at *1 (E.D. Tenn. Dec. 22, 2009) (describing decision as "hold[ing] that a pretrial motion must actually cause a delay, or the expectation of a delay, of trial in order to create excludable time") (brackets in original); *United States* v. *Jerdine*, No. 1:08-CR-00481, 2009 WL 4906564, at *5 (N.D. Ohio Dec. 18, 2009) (same); *United States* v. *Mayes*, No. 3:09-CR-129, 2009 WL 4784000, at *1 (E.D. Tenn. Dec. 8, 2009) (same); *United States* v. *Abernathy*, No. 08-20103, 2009 WL 4506417, at *2 (E.D. Mich. Nov. 30, 2009) (same).

As the court below acknowledged, its holding conflicts with the decisions of the other circuits because they "have held that the filing of any pretrial motion stops the Speedy Trial clock, regardless of whether the motion has any impact on the trial's start date." Pet. App. 16a. Indeed, the court spent several pages of its opinion attempting to refute the reasons advanced by other circuits for rejecting its position. *Id.* at 16a-19a.

Although the court below noted that the parties and the district court had an "understanding" that the motions in this case would not affect the trial schedule, Pet. App. 20a, it did not state that "the parties kn[e]w from the moment that [the] pretrial motions [were] filed" (Br. in Opp. 6) that they would not do so. Indeed, such a statement would not have been accurate. At the time the motions were filed, the parties could not have been certain that the district court would not need additional time to resolve the legal issues presented. In addition, one motion involved a request to depose a witness. Although the district court directed the parties to schedule the "deposition posthaste so as not to delay trial," Pet. App. 19a (citation omitted), neither the parties nor the court could have been certain from the outset that events beyond their control (such as the witness's unavailability) would not delay the deposition and require postponement of the trial.

2. Even if respondent's characterization of the Sixth Circuit's holding were accurate, the decision below would still conflict with decisions of other courts of appeals.

Other circuits have held that the filing of "any pretrial motion * * * tolls the speedy trial clock automatically," *United States* v. *Green*, 508 F.3d 195, 200 (5th Cir. 2007), cert. denied, 128 S. Ct. 2871 (2008), "regardless of its type or its actual effect on the trial," *United States* v. *Hood*, 469 F.3d 7, 10 (1st Cir. 2006); see Pet. 9 (citing cases). Even under respondent's interpretation, the decision below conflicts with those decisions because it holds that certain pretrial motions—those that the parties know from the outset will not affect the trial date—do not create excludable time.

Respondent incorrectly contends (Br. in Opp. 9) that no other circuit has addressed a situation where it was clear from the outset that pretrial motions would not affect the trial schedule. At least two courts have addressed that situ-

ation and held that the time consumed by such motions was excludable. In *United States* v. *Wilson*, 835 F.2d 1440 (D.C. Cir. 1987), the district court had already postponed the trial until completion of a related trial, so the pretrial motions could not have affected the trial schedule. The D.C. Circuit nonetheless excluded the time the motions were pending. *Id.* at 1441-1443. And in *United States* v. *Stafford*, 697 F.2d 1368 (11th Cir. 1983), the trial court had determined that it would rule on two motions "just prior to commencement of the trial, whenever that is," so they would "cause[] no delay" of the trial. *Id.* at 1371. Nonetheless, the Eleventh Circuit excluded the time consumed by those motions. *Id.* at 1371-1372.

Respondent also incorrectly speculates (Br. in Opp. 9-11) that three other circuits would agree with the Sixth Circuit's decision on the facts of this case. That contention is based on cases addressing an entirely different situation. In *United States* v. *Clymer*, 25 F.3d 824 (1994), the district court continued a pretrial motion until after trial, and the Ninth Circuit concluded that the time between the continuance and the commencement of trial was not excludable. *Id.* at 829-830. "In effect," the court explained, "the district court denied the motion without prejudice to the filing of a renewed submission after the conclusion of the trial." *Id.* at 830. The Second Circuit reached the same result on the same facts in *United States* v. *Gambino*, 59 F.3d 353 (1995), cert. denied, 517 U.S. 1187 (1996). In *United States* v. *Salimonu*, 182 F.3d 63 (1999), the First Circuit explained that the rule in *Clymer* and *Gambino* applies only when "district courts explicitly continue[] the motions at issue until the end of trial." *Id.* at 68-69. The Ninth and Second Circuits have also limited *Clymer* and *Gambino* to that situation and held that when, as in this case, motions are decided before trial, the time they are pending is excluded

regardless of their impact on the trial's start date. *United States* v. *Vo*, 413 F.3d 1010, 1015 (9th Cir.), cert. denied, 546 U.S. 1053 (2005); *United States* v. *Douglas*, 81 F.3d 324, 327 n.1 (2d Cir.), cert. denied, 517 U.S. 1251 (1996). Thus, respondent's cases in no way suggest that other circuits would agree with the Sixth Circuit's decision here.

B. The Decision Below Is Incorrect

Respondent's attempt (Br. in Opp. 6-7) to defend the merits of the decision below is also unpersuasive. Section 3161(h)(1)(D) excludes "[a]ny period" of "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(D). Thus, "[t]he plain terms of the statute appear to exclude all time between the filing of and the hearing on a motion" without further factual inquiry. *Henderson* v. *United States*, 476 U.S. 321, 326 (1986).

Like the court below, respondent mistakenly contends that a plain-language reading of the phrase "delay resulting from" requires a case-by-case inquiry into each motion's effect on the timing of trial. To the contrary, the remainder of Section 3161(h)(1)(D) categorically defines the excludable period of delay as the interval "from the filing of the motion through the conclusion of the hearing, or other prompt disposition of, [the] motion." 18 U.S.C. 3161(h)(1)(D). Read in its entirety, the plain language of Section 3161(h)(1)(D) thus contradicts rather than supports respondent's position.[1]

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[1] In addition, respondent's reading of the statute logically leads much farther than respondent acknowledges. If Section 3161(h)(1)(D) required a case-by-case inquiry into whether "delay" of the trial "result[ed] from" a motion, then the only question should be: "Did the motion *actually* delay the trial date?" Neither respondent nor the court below

Respondent's reading also conflicts with *Henderson*, which concluded that Section 3161(h)(1)(D) "is designed to exclude all time that is consumed in placing the trial court in a position to dispose of a motion," 476 U.S. at 331, and which excluded the time consumed in resolving pretrial motions without considering whether they caused or had the potential to cause postponement of the trial. Respondent erroneously asserts that the decision below can be reconciled with *Henderson* because the Court in *Henderson* purportedly "took it as a given that the pretrial motions had delayed trial." Br. in Opp. 8. On the contrary, the Court did not state that it was assuming that the motions had delayed the trial. Nor did the Court discuss whether a trial date had been set before the motions were filed or whether the district court rescheduled the trial because of the motions.

Respondent's assertion (Br. in Opp. 8) that *Bloate* v. *United States*, 130 S. Ct. 1345 (2010), supports the decision below is also incorrect. In *Bloate*, the Court reiterated that Section 3161(h)(1)(D)'s exclusion is "automatic" and applies "regardless of the specifics of the case." *Id.* at 1349 n.1; see *id.* at 1351 (delays listed in Section 3161(h)(1) are "automatically excludable, *i.e.*, they may be excluded without district court findings"). *Bloate* held that time granted to prepare pretrial motions was not excluded by Section 3161(h)(1)(D) because that provision "renders automatically excludable only the delay that occurs *from the filing of* the motion through the conclusion of the hearing on, or other prompt disposition of[,] the motion." *Id.* at 1353. Contrary to respondent's implication, however, both the majority and the dissent agreed that the request for additional motions

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explains how, under their reading of the statutory language, time could be excluded based on the "potential" or "expectation" of delay of the trial if a motion does not actually cause such a delay.

preparation time had resulted in "delay"—even though the district court did not move the trial date when it granted the request. See *ibid.*; *id.* at 1360 (dissenting opinion); 4:06-cr-00518-SNL Docket entry No. 20 (E.D. Mo. Sept. 7, 2006). *Bloate* thus undermines, rather than supports, the Sixth Circuit's holding here.

Respondent also offers no meaningful response to the petition's description (Pet. 13-15) of how the Sixth Circuit's unworkable rule undermines the STA's purposes. Although respondent asserts that those purposes are disserved by excluding time consumed by "motions that everyone knew would not delay trial" (Br. in Opp. 7), he acknowledges that such motions are "quite unusual" (*id.* at 11). Congress therefore reasonably concluded that the cost of excluding the time such motions consume is outweighed by the benefits of an administrable exclusion. See Pet. 12-13. Respondent's suggestion that the Sixth Circuit's rule is necessary to deter the government from filing frivolous motions to evade the STA is also unfounded. The STA itself contains sanctions to deter such abuse, 18 U.S.C. 3162(b), which has not materialized in other circuits even though they have long rejected the Sixth Circuit's rule.

C. The Question Presented Warrants Immediate Review

As the petition explains (Pet. 16), the question presented is recurring and important, and it warrants this Court's immediate review. Pretrial motions are filed in nearly every federal criminal case, and the decision below needlessly complicates the administration of the STA when they are filed in the Sixth Circuit. Although respondent contends (Br. in Opp. 12) that the decision is not generating unnecessary litigation, the district court cases cited in his own brief show the contrary. Those cases demonstrate that district courts in the Sixth Circuit are now compelled to

make findings whether "motions are complex" and "cause[] a delay of the trial" before invoking the exclusion, *Jerdine*, 2009 WL 4906564, at *5, contrary to Congress's intent that it apply "automatically * * * without district court findings," *Bloate*, 130 S. Ct. at 1351. The cases also illustrate that, to avoid possible dismissal under the decision below, district courts are relying on ends-of-justice continuances under Section 3161(h)(7), in addition to Section 3161(h)(1)(D), when excluding pretrial motion delay. See *Sutton*, 2009 WL 5196592, at *2; *Mayes*, 2009 WL 478400, at *1. The decision below is thus frustrating the very purpose of Section 3161(h)(1)(D)'s automatic exclusion, which is designed to avoid the need for courts to devote time and resources to case-specific analyses of whether the benefits of delay from a particular motion outweigh the cost.

Contrary to respondent's contention (Br. in Opp. 11), allowing further "percolation" would serve no purpose. As the petition explains (Pet. 8-9), every other court of appeals with criminal jurisdiction has already held that Section 3161(h)(1)(D) automatically excludes the time consumed by "any" pretrial motion "regardless of whether the motion has any impact on the trial's start date." Pet. App. 16a. And, also contrary to respondent's contention (Br. in Opp. 13), this Court's recent decision in *Bloate* strongly suggests that those courts have correctly interpreted Section 3161(h)(1)(D).

D. This Case Is An Appropriate Vehicle

Respondent's arguments that this case is a "poor vehicle" to decide the question presented (Br. in Opp. 13) also lack merit. Respondent argues that the Court should wait for another case because "little additional punishment would [be] accomplished" by reversing the decision below. *Id.* at 11. Reversal would, however, reinstate respondent's

convictions and require him to serve 18 additional months of supervised release. In any event, the legal issue is important and warrants this Court's prompt resolution.

Respondent also contends (Br. in Opp. 13-16) that the Court should not grant review because the STA was violated for two other reasons even if the time consumed by the pretrial motions is excludable. But the court of appeals already correctly rejected respondent's alternative STA arguments, and this Court not need address them to resolve the question presented.

First, respondent argues (Br. in Opp. 13-15) that ten days of non-excludable delay elapsed during his transportation to a mental competency evaluation, because 18 U.S.C. 3161(h)(1)(F) permits exclusion of only "ten days" and his transportation took 20 calendar days. The court below, however, concluded that only two days of non-excludable delay elapsed because, under *United States* v. *Bond*, 956 F.2d 628 (6th Cir. 1992), weekends and holidays should be excluded in calculating the ten-day limit.

That conclusion was correct. Section 3161(h)(1)(F) does not specify whether the excludable period is ten calendar or ten business days. It is therefore reasonable to infer that Congress expected courts to use the same counting rules applicable in other criminal contexts. Accordingly, the Sixth Circuit correctly concluded, in accordance with the then-applicable version of Fed. R. Crim. P. 45(a), that weekends and holidays should be excluded.[2]

Every court of appeals that has addressed the issue has reached the same conclusion. See *United States* v. *McGhee*,

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[2] Rule 45(a) has since been amended, effective December 1, 2009, to "count every day, including intermediate Saturdays, Sundays, and legal holidays," for any "period * * * stated in days." Fed. R. Crim. P. 45(a). As respondent concedes (Br. in Opp. 15 n.9), the issue therefore does not warrant this Court's attention.

532 F.3d 733, 738 (8th Cir. 2008); *United States* v. *Garrett*, 45 F.3d 1135, 1140 n.6 (7th Cir.), cert. denied, 514 U.S. 1134 (1995); cf. *United States* v. *Skanes*, 17 F.3d 1352, 1354 (11th Cir. 1994) (citing decisions relying on Rule 45(a) in applying other STA time limits). The cases cited by respondent (Br. in Opp. 14) are not to the contrary. *United States* v. *Williamson*, 409 F. Supp. 2d 1105, 1107 n.1 (N.D. Iowa 2006), is a district court decision that was abrogated by the Eighth Circuit's decision in *McGhee*. The other cases did not address the issue but simply included weekends and holidays when calculating the ten-day period. See *United States* v. *Collins*, 90 F.3d 1420, 1427 (9th Cir. 1996); *United States* v. *Noone*, 913 F.2d 20, 25-26 (1st Cir. 1990), cert. denied, 500 U.S. 906 (1991); *United States* v. *Castle*, 906 F.2d 134, 137 (5th Cir. 1990). And *United States* v. *Daychild*, 357 F.3d 1082, 1093 & n.13 (9th Cir. 2004), merely concluded, based on the express language of Section 3161(h)(1)(D), that the excludable delay for pretrial motions includes the day on which a motion is filed, even though Rule 45(a)(1) generally does not count the day of a triggering event. The court below reached the same conclusion on that issue. Pet. App. 9a-10a.

Second, respondent claims that 18 U.S.C. 4247(b), which limits to 30 days the period during which a defendant may be committed for a competency evaluation under 18 U.S.C. 4241, should also limit the time excludable under the STA for competency evaluations. The court below correctly rejected that claim (Pet. App. 11a-12a), because it is contrary to the plain language of the STA, which excludes "[a]ny period of delay" resulting from competency examinations, 18 U.S.C. 3161(h)(1). Respondent cites no authority to support the claim and, as the court below noted, it has been rejected by every court that has considered it. Pet. App. 12a.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

AUGUST 2010

JOINT APPENDIX

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Docket No. 08-1765

UNITED STATES OF AMERICA

v.

JASON LOUIS TINKLENBERG

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
6/12/08	Criminal Case Docketed. Notice filed by Appellant Jason Louis Tinklenberg. Transcript needed: y. PROBATION VIOLATION—14 MONTH SENTENCE, EXPEDITED BRIEFING. (RGF)
	* * * * *
9/3/09	OPINION and JUDGMENT filed: District court's denial of defendant's motion to dismiss is REVERSED and case is REMANDED. Defendant's appeals of the finding that he violated his supervised release and his resulting sentence are DISMISSED as moot; decision for publication pursuant to local rule 206. Damon J. Keith, Eric L. Clay (AUTHORING), Julia

DATE	PROCEEDINGS
	Smith Gibbons (CONCURRING), Circuit Judges. [06-2646, 08-1765] (LKM)
	* * * * *
10/15/09	PETITION for en banc rehearing filed by Mr. Andrew Byerly Birge for USA in 08-1765, 06-2646. Certificate of Service: 10/15/2009. [08-1765, 06-2646] (ABB)
	* * * * *
1/12/10	ORDER filed denying petition for en banc rehearing [4070335-2], filed by Mr. Andrew Byerly Birge for USA. Damon J. Keith, Eric L. Clay, Julia Smith Gibbons, Circuit Judges. [06-2646, 08-1765] (BLH)
	* * * * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Docket No. 06-2646

UNITED STATES OF AMERICA

v.

JASON LOUIS TINKLENBERG

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
12/26/06	Criminal Case Docketed. Notice filed by Appellant Jason Louis Tinklenberg. Transcript needed: y. (PJE)
	* * * * *
1/12/09	APPELLEE BRIEF filed by Ms. Julie Ann Woods for USA in 08-1765, 06-2646. Certificate of Service: 01/12/2009. Argument Request: waived. [08-1765, 06-2646] (JAW)
	* * * * *
9/3/09	OPINION and JUDGMENT filed: District court's denial of defendant's motion to dismiss is REVERSED and case is REMANDED. Defendant's appeals of the finding that he violated his supervised re-

DATE	PROCEEDINGS
	lease and his resulting sentence are DISMISSED as moot; decision for publication pursuant to local rule 206. Damon J. Keith, Eric L. Clay (AUTHORING), Julia Smith Gibbons (CONCURRING), Circuit Judges. [06-2646, 08-1765] (LKM)
	* * * * *
10/15/09	PETITION for en banc rehearing filed by Mr. Andrew Byerly Birge for USA in 08-1765, 06-2646. Certificate of Service: 10/15/2009. [08-1765, 06-2646] (ABB)
	* * * * *
1/12/10	ORDER filed denying petition for en banc rehearing [4070335-2], filed by Mr. Andrew Byerly Birge for USA. Damon J. Keith, Eric L. Clay, Julia Smith Gibbons, Circuit Judges. [06-2646, 08-1765] (BLH)
	* * * * *
1/15/10	RESPONSE filed regarding a motion to stay mandate, [4119051-2]; previously filed by Mr. Andrew Byerly Birge for USA in 06-2646, 08-1765. Response from Attorney Mr. Kevin Michael Schad for Appellant Jason Louis Tinklenberg in 06-2646, 08-1765 Certificate of Service: .01/15/2010. [06-2646, 08-1765] (KMS)

DATE	PROCEEDINGS

* * * * *

1/28/10	ORDER filed DENYING appellee's motion to stay mandate filed by Mr. Andrew Byerly Birge for USA. Damon J. Keith, Circuit Judge; Eric L. Clay, Circuit Judge and Julia Smith Gibbons, Circuit Judge. [06-2646, 08-1765] (PJE)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:05-CR-00239-PLM-1

UNITED STATES OF AMERICA

v.

JASON LOUIS TINKLENBERG

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/20/05	1	INDICTMENT as to Jason Louis Tinklenberg (clc,) (Entered: 10/21/2005)
10/26/05	3	NOTICE *of Errata* by USA as to Jason Louis Ticklenberg re Indictment 1 (Woods, Julie) (Entered: 10/26/2005)
10/26/05		MOTION to amend/correct 1 Indictment *to correct spelling of defendant's name, as taken from document 3 Notice of Errata* by USA as to Jason Louis Tinklenberg (skr,) (Entered: 10/28/2005)
10/27/05	4	PROPOSED ORDER re 3 *Notice of Errata* by USA as to Jason

DATE	DOCKET NUMBER	PROCEEDINGS
		Louis Ticklenberg (Woods, Julie) (Entered: 10/27/2005)
10/27/05	5	PROPOSED ORDER re 3 *Notice of Errata Amended* by USA as to Jason Louis Ticklenberg (Woods, Julie) (Entered: 10/27/2005)
10/28/05	6	ORDER striking proposed order 4 as to Jason Louis Tinklenberg (1); granting proposed order 5 as to Jason Louis Tinklenberg (1); granting motion to amend/ correct Indictment 1 (named as Notice of Errata 3), as to Jason Louis Tinklenberg (1); signed by Judge Gordon J. Quist (Judge Gordon J. Quist, mil) Modified text on 10/31/2005 (skr) (Entered: 10/28/2005)
10/31/05	7	ORDER OF TEMPORARY DETENTION pursuant to the Bail Reform Act as to defendant Jason Louis Tinklenberg: detention hearing, with arraignment and initial pretrial conference, set for 11/2/2005 at 10:00 AM at 401 Federal Building, Grand Rapids, MI before Magistrate

DATE	DOCKET NUMBER	PROCEEDINGS
		Judge Ellen S. Carmody; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 10/31/2005)
10/31/05	8	ORDER APPOINTING FEDERAL PUBLIC DEFENDER as counsel for defendant Jason Louis Tinklenberg; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 10/31/2005)
10/31/05	9	ARREST WARRANT RETURNED EXECUTED; defendant Jason Louis Tinklenberg arrested on 10/31/05 (mdr,) (Entered: 10/31/2005)
10/31/05		ARREST of Jason Louis Tinklenberg (mdr,) (Entered: 10/31/2005)
10/31/05	10	MINUTES of FIRST APPEARANCE of defendant Jason Louis Tinklenberg held before Magistrate Judge Ellen S. Carmody; defendant's request for court appointed counsel granted; gov't seeks detention and deft re-

DATE	DOCKET NUMBER	PROCEEDINGS
		manded to custody of USM pending further proceedings (Proceedings Digitally Recorded) (Magistrate Judge Ellen S. Carmody, mdr) (Entered: 10/31/2005)
10/31/05		Copy of Order on Motion to Amend/Correct, 6 as to defendant Jason Louis Tinklenberg distributed to USM, US Probation (elc) (Entered: 10/31/2005)
11/1/05		Federal Public Defender recommends that Lawrence J. Phelan be appointed to represent defendant Jason Louis Tinklenberg (Federal Public Defender,) (Entered: 11/01/2005)
11/2/05	12	MINUTES as to defendant Jason Louis Tinklenberg held before Magistrate Judge Ellen S. Carmody; time set for Arraignment, Pretrial Conference and Detention Hearing; hearings did not take place; defense counsel requested psych eval for sanity and competency - granted; order to issue(Proceedings Digitally Recorded) (Magistrate Judge

DATE	DOCKET NUMBER	PROCEEDINGS
		Ellen S. Carmody, mdr) (Entered: 11/02/2005)
11/2/05	13	ORDER as to defendant Jason Louis Tinklenberg: pretrial conference set for 12/27/2005 at 03:30 PM at 499 Federal Building, Grand Rapids, MI before Judge Gordon J. Quist; jury trial set for 1/3/2006 at 08:30 AM at 499 Federal Building, Grand Rapids, MI before Judge Gordon J. Quist; ; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, mil) (Entered: 11/02/2005)
11/2/05	14	ORDER for psychiatric evaluation of defendant Jason Louis Tinklenberg (certified copy hand delivered to USMS by cbh); signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 11/02/2005)
11/7/05	15	CJA 20 APPOINTMENT of attorney Lawrence J. Phelan for Jason Louis Tinklenberg; signed by Magistrate Judge Ellen S.

DATE	DOCKET NUMBER	PROCEEDINGS
		Carmody (gjf) (Entered: 11/08/2005)
12/16/05	16	NOTICE *of Request for Extension of Time to Complete Psychological and Competency Evaulation* by USA as to Jason Louis Tinklenberg (Attachments: #1 Proposed Order) (Woods, Julie) (Entered: 12/16/2005)
12/19/05	18	MOTION for extension of time to file *report* by Jason Louis Tinklenberg; (elc,) (Entered: 12/27/2005)
12/20/05	17	ORDER as to defendant Jason Louis Tinklenberg; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, mil) (Entered: 12/20/2005)
12/21/05		Copy of Order 17 as to defendant Jason Louis Tinklenberg distributed to USM (final pretrial conf and trial is held in abeyance) (elc) Modified on 12/21/2005 to edit text (elc). (Entered: 12/21/2005)
12/28/05	19	ORDER granting request of the Federal Bureau of Prisons for a

DATE	DOCKET NUMBER	PROCEEDINGS
		30-day extension of time to complete the psychological evaluation of defendant Jason Louis Tinklenberg (1) 18; the evaluation shall be completed by 2/13/2006; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 12/28/2005)
12/29/05		Copy of Order on Motion for Extension of Time to File 19 as to defendant Jason Louis Tinklenberg faxed to Bureau of Prisons by cbh and hand delivered to USM by cbh (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 12/29/2005)
2/10/06	20	AMENDED MOTION for extension of time to file *psychological and competency evaluation* by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 02/10/2006)
2/17/06	21	ORDER granting Government's Amended Second Request for Extension of Time to Complete Psychological and Competency Evaluation 20 as to Jason Louis

DATE	DOCKET NUMBER	PROCEEDINGS
		Tinklenberg (1); the Metropolitan Correctional Center shall have until 3/13/2006 to complete the evaluation of the defendant; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 02/17/2006)
3/17/06	22	NOTICE OF HEARING as to Jason Louis Tinklenberg: competency hearing set for 3/22/2006 at 09:00 AM at 401 Federal Building, Grand Rapids, MI before Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 03/17/2006)
3/20/06	23	NOTICE OF HEARING as to Jason Louis Tinklenberg: competency hearing rescheduled to 3/22/2005 at 04:00 PM at 401 Federal Building, Grand Rapids, MI before Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 03/20/2006)
3/20/06	24	ORDER to seal Forensic Report and Addendum to Forensic Re-

DATE	DOCKET NUMBER	PROCEEDINGS
		port as to Jason Louis Tinklenberg; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 03/20/2006)
3/20/06	25	SEALED PSYCHIATRIC REPORT received as to Jason Louis Tinklenberg (mdr,) (Entered: 03/21/2006)
3/22/06	26	NOTICE OF HEARING as to defendant Jason Louis Tinklenberg: Arraignment, Initial Pretrial Conference, and Detention Hearing set for 3/23/2006 at 04:30 PM at 401 Federal Building, Grand Rapids, MI before Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 03/22/2006)
3/22/06	27	MINUTES of competency hearing as to defendant Jason Louis Tinklenberg held before Magistrate Judge Ellen S. Carmody; defendant found competent to stand trial; defendant remanded to custody of USM (Proceedings Digitally Recorded) (Magistrate

DATE	DOCKET NUMBER	PROCEEDINGS
		Judge Ellen S. Carmody, mdr) (Entered: 03/22/2006)
3/23/06	28	ORDER as to defendant Jason Louis Tinklenberg: Defendant is found competent within the meaning of 18 U.S.C. 4241(d); this order does not address defendant's mental state at the time of the offense; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 03/23/2006)
3/24/06	29	MINUTES of ARRAIGNMENT, initial pretrial conference and DETENTION hearing as to Jason Louis Tinklenberg (1) held before Magistrate Judge Ellen S. Carmody; defendant entered a plea of not guilty as to Counts 1-3; defendant remanded to custody of USM pending trial (Proceedings Digitally Recorded) (Magistrate Judge Ellen S. Carmody, mdr) (Entered: 03/24/2006)
3/23/06	30	PRETRIAL CONFERENCE SUMMARY ORDER as to defendant Jason Louis Tinklenberg;

DATE	DOCKET NUMBER	PROCEEDINGS
		jury trial estimated to last 2 days; motions to be filed no later than 3 weeks from today's date; signed by Magistrate Judge Ellen S. Carmody (mdr,) (Entered: 03/24/2006)
3/24/06	31	INITIAL DISCOVERY ORDER as to defendant Jason Louis Tinklenberg; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 03/24/2006)
3/24/06	32	ORDER OF DETENTION pending trial as to defendant Jason Louis Tinklenberg; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 03/24/2006)
3/27/06	33	ORDER as to defendant Jason Louis Tinklenberg: pretrial conference set for 5/15/2006 at 03:00 PM at 499 Federal Building, Grand Rapids, MI before Judge Gordon J. Quist; jury trial set for 5/30/2006 at 08:30 AM at 499 Federal Building, Grand Rapids,

DATE	DOCKET NUMBER	PROCEEDINGS
		MI before Judge Gordon J. Quist; ; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, mil) (Entered: 03/27/2006)
3/29/06	34	EX PARTE PETITION for an independent forensic competency and mental evaluation by Jason Louis Tinklenberg; (Attachments:, # 1 Proposed Order) (elc,) Modified on 4/3/2006 to edit text (elc). (Entered: 04/03/2006)
3/29/06	35	PROOF OF SERVICE by Jason Louis Tinklenberg re MOTION for psychiatric exam 34 (elc,) (Entered: 04/03/2006)
4/17/06	36	ORDER for psychiatric evaluation of defendant Jason Louis Tinklenberg by Jeffrey T. Kieliszewski, Ph.D.; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 04/17/2006)
4/19/06		Cert Copy of Order for Psychiatric Evaluation 36 as to defendant Jason Louis Tinklenberg distributed to USM (elc) (Entered: 04/19/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
4/26/06	37	PRO SE MOTION to appoint counsel by Jason Louis Tinklenberg; (Attachments:, # 1 Attachment 1, # 2 Attachment 2) (elc,) (Entered: 04/27/2006)
5/9/06	38	MOTION to withdraw as attorney by Lawrence J. Phelan by Jason Louis Tinklenberg; (Attachments: # 1 Attachment Memorandum in Support of Counsel's Motion to Withdraw as Counsel) (Phelan, Lawrence) (Entered: 05/09/2006)
5/15/06	39	MINUTES of pretrial conference as to defendant Jason Louis Tinklenberg held before Judge Gordon J. Quist (Court Reporter: Diane Calsbeek) (Judge Gordon J. Quist, mil) (Entered: 05/15/2006)
5/16/06	40	ORDER REFERRING MOTION as to Jason Louis Tinklenberg 38 MOTION to withdraw as attorney by Lawrence J. Phelan filed by Jason Louis Tinklenberg, 37 PRO SE MOTION to appoint counsel filed by Jason Louis Tinklenberg, OR-

DATE	DOCKET NUMBER	PROCEEDINGS
		DER ADJOURNING TRIAL DATE; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, mil) (Entered: 05/16/2006)
5/17/06		Copy of Order Referring Motion, 40 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (elc) (Entered: 05/17/2006)
5/30/06	41	NOTICE OF HEARING ON MOTION as to defendant Jason Louis Tinklenberg regarding document numbers 37 and 38: motion hearing is set for 6/5/2006 at 02:00 PM at 401 Federal Building, Grand Rapids, MI before Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 05/30/2006)
5/31/06	42	AMENDED NOTICE OF HEARING ON MOTION as to defendant Jason Louis Tinklenberg regarding document numbers 37 and 38: motion hearing is rescheduled to 6/7/2006 at 03:30 PM at 401 Federal Building, Grand Rapids, MI before Magis-

DATE	DOCKET NUMBER	PROCEEDINGS
		trate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 05/31/2006)
5/31/06		Copy of Notice of Hearing on Motion, 41, 42 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (rlw,) Modified on 5/31/2006 to edit text (rlw,). (Entered: 05/31/2006)
6/7/06	43	MINUTES of motion hearing as to defendant Jason Louis Tinklenberg re 38 MOTION to withdraw as attorney by Lawrence J. Phelan filed by Jason Louis Tinklenberg and 37 PRO SE MOTION to appoint counsel filed by Jason Louis Tinklenberg held before Magistrate Judge Ellen S. Carmody; detention continued (Proceedings Digitally Recorded) (Magistrate Judge Ellen S. Carmody, mdr) (Entered: 06/08/2006)
6/9/06	44	ORDER granting Defendant's Pro Se Motion for New Counsel 37 and Defendant's Counsel's Motion to Withdraw 38 as to Ja-

DATE	DOCKET NUMBER	PROCEEDINGS
		son Louis Tinklenberg (1); signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 06/09/2006)
6/9/06	45	ORDER APPOINTING FEDERAL PUBLIC DEFENDER as new counsel for defendant Jason Louis Tinklenberg; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 06/09/2006)
6/9/06	46	SEALED PSYCHOLOGICAL EVALUATION received as to Jason Louis Tinklenberg (mdr,) (Entered: 06/12/2006)
6/13/06	47	ORDER as to defendant Jason Louis Tinklenberg: pretrial conference set for 8/8/2006 at 02:30 PM at 499 Federal Building, Grand Rapids, MI before Judge Gordon J. Quist; jury trial set for 8/15/2006 at 08:30 AM at 499 Federal Building, Grand Rapids, MI before Judge Gordon J. Quist; ; signed by Judge Gordon

DATE	DOCKET NUMBER	PROCEEDINGS
		J. Quist (Judge Gordon J. Quist, mil) (Entered: 06/13/2006)
6/15/06	48	ATTORNEY APPEARANCE of Richard D. Stroba for defendant Jason Louis Tinklenberg (Stroba, Richard) (Entered: 06/15/2006)
6/15/06	49	ORDER REJECTING PLEADING (letter re proceedings on 6/7/06); signed by Magistrate Judge Ellen S. Carmody (Attachments:, # 1 Proposed Document) (elc) (Entered: 06/16/2006)
6/16/06		Copy of Order Setting Pretrial and Jury Trial, 47 as to defendant Jason Louis Tinklenberg distributed to Richard D. Stroba (elc) (Entered: 06/16/2006)
6/16/06		Copy of Order Rejecting Pleading 49 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg w/proposed document (elc) (Entered: 06/16/2006)
6/20/06	50	LETTER from deft requesting copies of various documents; mailed docket sheet and in-

DATE	DOCKET NUMBER	PROCEEDINGS
		formed deft of the prepayment requirement before his request can be filled re Jason Louis Tinklenberg (elc,) Modified on 6/23/2006 to edit text (elc). (Entered: 06/23/2006)
6/27/06	51	TRANSCRIPT of Initial Appearance held October 31, 2005 before Hon. Ellen S. Carmody, US Mag. Judge as to Jason Louis Tinklenberg (Transcriptionist: Pritchard, Pat) (Entered: 06/27/2006)
6/27/06	52	TRANSCRIPT of Arraignment/ IPC/Detention Hearing held November 2, 2005 before Hon. Ellen S. Carmody, US Mag. Judge as to Jason Louis Tinklenberg (Transcriptionist: Pritchard, Pat) (Entered: 06/27/2006)
6/27/06	53	TRANSCRIPT of Competency hearing held March 22, 2006 before Hon. Ellen S. Carmody, US Mag. Judge as to Jason Louis Tinklenberg (Transcriptionist: Pritchard, Pat) (Entered: 06/27/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
6/27/06	54	TRANSCRIPT of Motion hearing held March 23, 2006 before Hon. Ellen S. Carmody, US Mag. Judge as to Jason Louis Tinklenberg (Transcriptionist: Pritchard, Pat) (Entered: 06/27/2006)
6/27/06	55	ORDER REJECTING PLEADING (request for investigation of an attorney); signed by Magistrate Judge Ellen S. Carmody (Attachments:, # 1 Proposed Document) (elc) Modified on 8/22/2006 to correct spelling (elc). (Entered: 06/30/2006)
6/30/06		Copy of Order Rejecting Pleading 55 w/proposed document mailed to Jason Tinklenberg at the Newaygo Co. Jail, PO Box 845, White Cloud, MI 49349 (elc) (Entered: 06/30/2006)
7/5/06	56	TRANSCRIPT of Final Pretrial held May 15, 2006, before the Hon. Gordon J. Quist, as to Jason Louis Tinklenberg (Court Reporter: Calsbeek, Diane (616) 451-3587) Modified on 7/6/2006 to

DATE	DOCKET NUMBER	PROCEEDINGS
		correct date (elc). (Entered: 07/05/2006)
7/25/06	57	ADMINISTRATIVE ORDER number 06-072 reassigning case as to defendant Jason Louis Tinklenberg to Senior Judge Richard Alan Enslen for all further proceedings; Judge Gordon J. Quist no longer assigned to case; signed by Chief Judge Robert Holmes Bell (elc) (Entered: 07/25/2006)
7/25/06	58	CASE MANAGEMENT ORDER as to defendant Jason Louis Tinklenberg: pretrial conference set for 8/7/2006 at 02:30 PM at 174 Federal Building, Kalamazoo, MI before Senior Judge Richard Alan Enslen; jury trial set for 8/14/2006 at 08:30 AM at 174 Federal Building, Kalamazoo, MI before Senior Judge Richard Alan Enslen; ; signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, sas) (Entered: 07/25/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
8/1/06	59	PROPOSED JURY INSTRUCTIONS by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/01/2006)
8/1/06	60	MOTION to take video deposition by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/01/2006)
8/1/06	61	PROPOSED ORDER re 60 by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/01/2006)
8/2/06	62	PROPOSED VOIR DIRE by Jason Louis Tinklenberg (Stroba, Richard) (Entered: 08/02/2006)
8/2/06	63	ORDER TO RESPOND to plaintiff's motion for a video deposition 60 as soon as possible, but not later than August 9, 2006 as to defendant Jason Louis Tinklenberg ; signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 08/02/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
8/2/06	64	RESPONSE to Motion by Jason Louis Tinklenberg re MOTION to take video deposition 60 (Stroba, Richard) (Entered: 08/02/2006)
8/3/06	65	ORDER granting motion to take video deposition 60 as to Jason Louis Tinklenberg (1), parties shall schedule the deposition posthaste so as not to delay trial; signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 08/03/2006)
8/3/06	66	TRIAL BRIEF by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/03/2006)
8/3/06	67	NOTICE *of Video deposition of Joshua Howk* by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/03/2006)
8/3/06	68	NOTICE *AMENDED Notice of Video Deposition of Joshua Howk* by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/03/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
8/7/06	69	MINUTES of pretrial conference as to defendant Jason Louis Tinklenberg held before Senior Judge Richard Alan Enslen (Court Reporter: Kathleen Thomas) (Senior Judge Richard Alan Enslen, blb) (Entered: 08/07/2006)
8/8/06	70	REQUEST and PROPOSED ORDER by USA as to Jason Louis Tinklenberg seeking to permit firearm to enter the courthouse and to be stored pending conclusion of trial (Woods, Julie) (Entered: 08/08/2006)
8/8/06	71	PROPOSED ORDER re 70 *to Permit Firearm to Enter the Courthouse and to be Stored Overnight Pending Conclusion of Trial* by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/08/2006)
8/8/06	72	PROPOSED VOIR DIRE by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/08/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
8/10/06	73	ORDER granting proposed order 71 as to Jason Louis Tinklenberg (1); signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, sas) (Entered: 08/10/2006)
8/11/06	74	MOTION to dismiss on Speedy Trial *entitled: Defendant's Motion to Dismiss Based On Violation of the Speedy Trial Act an Brief in Support thereof* by Jason Louis Tinklenberg; (Attachments: # 1 Attachment 1: Court's Docket Sheet # 2 Attachment 2: March 16, 2006 letter) (Stroba, Richard) (Entered: 08/11/2006)
8/11/06	75	RESPONSE to Motion by USA as to Jason Louis Tinklenberg re MOTION to dismiss on Speedy Trial *entitled: Defendant's Motion to Dismiss Based On Violation of the Speedy Trial Act an Brief in Support thereof* 74 (Woods, Julie) (Entered: 08/11/2006)
8/14/06	76	SUPPLEMENT re 75 *Government's Response to Defendant's Motion to Dismiss* by USA as to

DATE	DOCKET NUMBER	PROCEEDINGS
		Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/14/2006)
8/14/06	77	ORDER denying motion to dismiss for Speedy Trial 74 as to Jason Louis Tinklenberg (1); signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 08/14/2006)
8/14/06	78	MINUTES of JURY TRIAL as to defendant Jason Louis Tinklenberg; held before Senior Judge Richard Alan Enslen (Court Reporter: Kathleen Thomas) (Senior Judge Richard Alan Enslen, blb) (Entered: 08/14/2006)
8/15/06	79	MOTION for reconsideration re 77 Order on Motion to Dismiss for Speedy Trial *entitled: Defendant's Motion for Reconsideratioin of Order Denying Defendant's Motion to Dismiss and Brief in Support* by Jason Louis Tinklenberg; (Stroba, Richard) (Entered: 08/15/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
8/15/06	80	MINUTES of JURY TRIAL as to defendant Jason Louis Tinklenberg held before Senior Judge Richard Alan Enslen (Court Reporter: Kathleen Thomas) (Senior Judge Richard Alan Enslen, blb) (Entered: 08/15/2006)
8/15/06	81	ORDER denying defendant's motion for reconsideration 79 as to Jason Louis Tinklenberg (1); signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 08/15/2006)
8/16/06	82	JURY VERDICT as to Jason Louis Tinklenberg (1) Guilty on Count 1, 2-3 (acr,) (Entered: 08/16/2006)
8/16/06	83	Jury Notes as to Jason Louis Tinklenberg (acr,) (Entered: 08/16/2006)
8/16/06	84	MINUTES of JURY TRIAL as to defendant Jason Louis Tinklenberg, defendant found guilty of Counts One, Two and Three held before Senior Judge Richard Alan Enslen (Court Reporter: Kathleen Thomas) (Se-

DATE	DOCKET NUMBER	PROCEEDINGS
		nior Judge Richard Alan Enslen, blb) (Entered: 08/17/2006)
8/21/06	85	ORDER as to defendant Jason Louis Tinklenberg sentencing set for 11/15/2006 at 02:30 PM at 174 Federal Building, Kalamazoo, MI before Senior Judge Richard Alan Enslen; signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 08/21/2006)
8/22/06	86	MOTION for acquittal *entitled: Motion For Judgment of Acquittal As To Count I* by Jason Louis Tinklenberg; (Stroba, Richard) (Entered: 08/22/2006)
8/22/06	87	MOTION for acquittal *entitled: Motion for Judgment of Acquittal as to Counts II and III* by Jason Louis Tinklenberg; (Stroba, Richard) (Entered: 08/22/2006)
8/22/06	88	MEMORANDUM in support by Jason Louis Tinklenberg re MOTION for acquittal *entitled: Motion for Judgment of Acquittal*

DATE	DOCKET NUMBER	PROCEEDINGS
		as to Counts II and III 87, MOTION for acquittal *entitled: Motion For Judgment of Acquittal As To Count I* 86 (Stroba, Richard) (Entered: 08/22/2006)
8/22/06	89	LETTER from Jason Tinklenber,; regarding appeal re Jason Louis Tinklenberg (acr,) Modified text on 8/25/2006 (acr,). (Entered: 08/23/2006)
8/22/06		NOTICE OF APPEAL (Interlocutory) by Jason Louis Tinklenberg re Order on Motion to Dismiss for Speedy Trial 77, Order on Motion for Reconsideration 81 *taken from pro se letter* 89 (acr,) (Entered: 08/29/2006)
8/23/06	90	MOTION to appoint counsel by Jason Louis Tinklenberg; (rlw,) (Entered: 08/24/2006)
8/24/06	91	RESPONSE to Motion by USA as to Jason Louis Tinklenberg re MOTION for acquittal *entitled: Motion for Judgment of Acquittal as to Counts II and III* 87, MOTION for acquittal *entitled: Motion For Judgment of Acquittal As To Count I* 86 (Attach-

DATE	DOCKET NUMBER	PROCEEDINGS
		ments: # 1 Attachment Excerpt of Transcript) (Woods, Julie) (Entered: 08/24/2006)
8/31/06	92	LETTER from Jason Tinklenberg regarding ineffective counsel and request for retrial, or dismissal, on grounds of speedy trial re Jason Louis Tinklenberg (rlw,) Modified text on 9/8/2006 (rlw,). (Entered: 09/01/2006)
9/5/06	93	LETTER from Jason Tinklenberg regarding ineffective assistance of counsel re Jason Louis Tinklenberg (rlw,) Modified text on 9/8/2006 (rlw,). (Entered: 09/05/2006)
9/13/06	94	ORDER permitting presentence investigator and his supervisor access to sealed psycological report as to defendant Jason Louis Tinklenberg; signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 09/13/2006)
9/22/06	95	ORDER denying motion for acquittal 86 as to Jason Louis Tinklenberg (1); denying motion for acquittal 87 as to Jason Louis

DATE	DOCKET NUMBER	PROCEEDINGS
		Tinklenberg (1); signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, sas) (Entered: 09/22/2006)
9/22/06		Copy of Order on Motion for Acquittal, 95 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (rlw,) (Entered: 09/22/2006)
9/29/06	96	NOTICE rescheduling hearing as to Jason Louis Tinklenberg sentencing set for 12/6/2006 at 03:30 PM at 174 Federal Building, Kalamazoo, MI before Senior Judge Richard Alan Enslen; (Senior Judge Richard Alan Enslen, blb) (Entered: 09/29/2006)
10/2/06	97	NOTICE OF HEARING ON MOTION as to defendant Jason Louis Tinklenberg regarding document number 90: motion hearing is set for 12/6/2006 at 03:30 PM at 174 Federal Building, Kalamazoo, MI before Senior Judge Richard Alan Enslen; (Senior Judge Richard Alan

DATE	DOCKET NUMBER	PROCEEDINGS
		Enslen, sas) (Entered: 10/02/2006)
10/2/06		Copy of Notice of Hearing on Motion, 97 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (rlw,) (Entered: 10/02/2006)
10/2/06		CASE NUMBER 06-2205 assigned by Sixth Circuit Court of Appeals as to defendant Jason Louis Tinklenberg (kad,) (Entered: 10/04/2006)
10/5/06	98	MOTION to reassign case *entitled: Motion for Guidance From The Court As To Continuing Representation of the Defendant* by Jason Louis Tinklenberg; (Stroba, Richard) (Entered: 10/05/2006)
10/5/06	99	MEMORANDUM in support by Jason Louis Tinklenberg re MOTION to reassign case *entitled: Motion for Guidance From The Court As To Continuing Representation of the Defendant* 98 (Stroba, Richard) (Entered: 10/05/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
10/5/06	100	NOTICE OF HEARING ON MOTION as to defendant Jason Louis Tinklenberg regarding document numbers 90, 98: motion hearing is set for 10/16/2006 at 02:00 PM at 174 Federal Building, Kalamazoo, MI before Senior Judge Richard Alan Enslen; (Senior Judge Richard Alan Enslen, sas) (Entered: 10/05/2006)
10/6/06		Copy of Notice of Hearing on Motion, 100 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (rlw,) (Entered: 10/06/2006)
10/6/06	101	TRANSCRIPT REQUEST by Jason Louis Tinklenberg for proceedings held on August 14, 15 & 16, 2006 before Judge Richard Alan Enslen, re Notice of Appeal - Interlocutory (Stroba, Richard) (Entered: 10/06/2006)
10/10/06	102	LETTER from Jason Louis Tinklenberg regarding ineffective assistance of counsel (copy) re Jason Louis Tinklenberg (acr,) (Entered: 10/11/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
10/11/06	103	LETTER from Jason Tinklenberg to Clerk of Court (copy of) requesting information with response from Clerk; mailed response to defendant re Jason Louis Tinklenberg (Attachments:, # 1 photocopies of Notice of Appeal, Transcript Order and CJA 24 form) (aer,) Modified text on 10/16/2006 (aer,). (Entered: 10/13/2006)
10/16/06	104	MINUTES of motion hearing as to defendant Jason Louis Tinklenberg re 90 MOTION to appoint counsel filed by Jason Louis Tinklenberg; held before Senior Judge Richard Alan Enslen (Court Reporter: Kathleen Thomas) (Senior Judge Richard Alan Enslen, blb) (Entered: 10/16/2006)
10/18/06	105	ORDER denying defendant's motion to appoint counsel 90 as to Jason Louis Tinklenberg (1); denying attorney Stroba's motion to reassign case 98 as to Jason Louis Tinklenberg (1); DISCHARGING attorney Stroba as counsel for Defendant Jason

DATE	DOCKET NUMBER	PROCEEDINGS
		Louis Tinklenberg, who shall proceed pro se with the assistance of attorney Stroba as standby counsel; attorney Stroba will attempt to meet with Defendant once more before the sentencing hearing on Dec. 6, 2006 to provide legal assistance; signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 10/18/2006)
10/18/06		Copy of Order on Motion to Appoint Counsel, Order on Motion to Reassign Case, 105 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (aer,) (Entered: 10/18/2006)
10/27/06	106	NOTICE rescheduling sentencing as to Jason Louis Tinklenberg for 12/13/2006 at 09:00 AM at 174 Federal Building, Kalamazoo, MI before Senior Judge Richard Alan Enslen; (Senior Judge Richard Alan Enslen, sas) (Entered: 10/27/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
10/27/06		Copy of Notice Rescheduling Hearing 106 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (rlw,) (Entered: 10/27/2006)
10/30/06	107	ORDER of USCA (certified copy) as to Jason Louis Tinklenberg re Notice of Appeal - Interlocutory *that the appeal is dismissed sua sponte as premature, without prejudice* (rlw,) (Entered: 10/31/2006)
11/1/06	108	ORDER REJECTING PLEADING; signed by Senior Judge Richard Alan Enslen (Attachments:, # 1 Attachment Motion to Move for a New Trial, # 2 Attachment Motion to Petition this Honorable Court Claims of Misdirection in the Jury Instruction, # 3 Attachment Ex Parte Motion to Allow Defendant to Come Before this Honorable Court to Address Unresolved Discovery for the Record or Request a Ginther Hearing, # 4 Attachment Motion to Petition the Court of Habeas Corpus and Motion of Revocation, # 5 Attachment Motions to

DATE	DOCKET NUMBER	PROCEEDINGS
		Belabor for a Review of Order Denying Defendant's Motion to Dismiss as to a Violation of Defendant's Speedy Trial Act Rights) (rlw,) (Entered: 11/01/2006)
11/3/06	109	ORDER REJECTING PLEADING; signed by Senior Judge Richard Alan Enslen (Attachments:, # 1 Attachment motion for new trial due to newly discovered evidence or dismissal with prejudice) (rlw,) (Entered: 11/03/2006)
11/9/06	110	MOTION for leave to file *to resubmit corrected pleadings* by Jason Louis Tinklenberg; (rlw,) (Entered: 11/09/2006)
11/9/06	111	EX PARTE MOTION for discovery *(unresolved) or request a Ginther Hearing* by Jason Louis Tinklenberg; (Attachments:, # 1 Attachment Order Rejecting Pleading) (rlw,) (Entered: 11/09/2006)
11/9/06	112	MOTION to set aside verdict by Jason Louis Tinklenberg; (rlw,) (Entered: 11/09/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
11/9/06	113	MOTION for release from custody *(habeas corpus) and for revocation* by Jason Louis Tinklenberg; (Attachments:, # 1 Attachment Order Rejecting Pleading) (rlw,) (Entered: 11/09/2006)
11/9/06	114	MOTION for new trial *with brief in support* by Jason Louis Tinklenberg; (Attachments:, # 1 Attachment Order Rejecting Pleading) (rlw,) (Entered: 11/09/2006)
11/9/06	115	MOTION to dismiss on Speedy Trial *with brief in support* by Jason Louis Tinklenberg; (Attachments:, # 1 Attachment Order Rejecting Pleading) (rlw,) (Entered: 11/09/2006)
11/14/06	116	MOTION for new trial *due to newly discovered evidence or dismissal with prejudice* by Jason Louis Tinklenberg; (Attachments:, # 1 Attachment) (acr,) (Entered: 11/15/2006)
11/27/06	117	LETTER from Jason Tinklenberg requesting a copy of his docket sheet - copy mailed this date re Jason Louis Tinklenberg (rlw,) (Entered: 11/28/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
12/1/06	118	ORDER as to defendant Jason Louis Tinklenberg re 111, 112, 113, 114, 115 and 116; the United States shall file a response no later than December 6, 2006 at 5:00 p.m.; signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, sas) (Entered: 12/01/2006)
12/1/06		Copy of Order, 118 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (rlw,) (Entered: 12/01/2006)
12/4/06	138	NOTICE OF APPEAL by Jason Louis Tinklenberg re Judgment 137 (rlw,) (Entered: 12/18/2006)
12/5/06	119	RESPONSE to Motion by USA as to Jason Louis Tinklenberg re MOTION to set aside verdict 112 (Woods, Julie) (Entered: 12/05/2006)
12/5/06	120	RESPONSE to Motion by USA as to Jason Louis Tinklenberg re MOTION for release from custody *(habeas corpus) and for revocation* 113 (Woods, Julie) (Entered: 12/05/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
12/5/06	121	RESPONSE to Motion by USA as to Jason Louis Tinklenberg re MOTION to dismiss on Speedy Trial *with brief in support* 115 (Woods, Julie) (Entered: 12/05/2006)
12/5/06	122	RESPONSE to Motion by USA as to Jason Louis Tinklenberg re MOTION for new trial with *brief in support* 114, MOTION for new trial *due to newly discovered evidence or dismissal with prejudice* 116 (Woods, Julie) (Entered: 12/05/2006)
12/5/06	123	CERTIFICATE OF SERVICE by USA as to Jason Louis Tinklenberg re Response to Motion 120, Response to Motion 122, Response to Motion 119, Response to Motion 121 (Woods, Julie) (Entered: 12/05/2006)
12/5/06	124	RESPONSE to Motion by USA as to Jason Louis Tinklenberg re EX PARTE MOTION for discovery *(unresolved) or request a Ginther Hearing* 111 (Woods, Julie) (Entered: 12/05/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
12/5/06	125	CERTIFICATE OF SERVICE by USA as to Jason Louis Tinklenberg re Response to Motion 124 (Woods, Julie) (Entered: 12/05/2006)
12/6/06	126	TRANSCRIPT of Jury Trial - Volume I held August 14, 2006 before the Honorable Richard Alan Enslen as to Jason Louis Tinklenberg (Court Reporter: K. Thomas, (269) 385-3050) (Entered: 12/06/2006)
12/6/06	127	TRANSCRIPT of Jury Trial - Volume II held August 15, 2006 before the Honorable Richard Alan Enslen as to Jason Louis Tinklenberg (Court Reporter: K. Thomas, (269) 385-3050) (Entered: 12/06/2006)
12/6/06	128	TRANSCRIPT of Jury Trial - Volume III held August 16, 2006 before the Honorable Richard Alan Enslen as to Jason Louis Tinklenberg (Court Reporter: K. Thomas, (269) 385-3050) (Entered: 12/06/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
12/6/06	129	OBJECTION *to the presentence report* by Jason Louis Tinklenberg (Attachments:, # 1 Attachment) (rlw,) (Entered: 12/07/2006)
12/7/06	130	EXHIBIT re 127 , 128 , 126 *video deposition of Joshua Houk* by plaintiff USA (rlw,) (Entered: 12/08/2006)
12/11/06	131	ORDER denying motion for discovery 111 as to Jason Louis Tinklenberg (1); denying motion to set aside verdict 112 as to Jason Louis Tinklenberg (1); denying motion for release from custody 113 as to Jason Louis Tinklenberg (1); denying motion for new trial 114 as to Jason Louis Tinklenberg (1); denying motion to dismiss for Speedy Trial 115 as to Jason Louis Tinklenberg (1); denying motion for new trial 116 as to Jason Louis Tinklenberg (1); signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 12/11/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
12/11/06		Copy of Order on Motion for Discovery, Order on Motion to Set Aside Verdict, Order on Motion for Release from Custody, Order on Motion for New Trial, Order on Motion to Dismiss for Speedy Trial, 131 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (rlw,) (Entered: 12/11/2006)
12/13/06	132	ACKNOWLEDGMENT of receipt of appeal packet by Jason Louis Tinklenberg (acr,) (Entered: 12/13/2006)
12/13/06	133	MINUTES of SENTENCING for Jason Louis Tinklenberg (1), Count(s) 1, 2-3, 33 months as to each count, concurrent; 3 years supervised release each count, concurrent; $300 speical assessment held before Senior Judge Richard Alan Enslen (Court Reporter: Kathleen Thomas) (Senior Judge Richard Alan Enslen, blb) (Entered: 12/13/2006)
12/14/06	134	ORDER that sealed psychiatric report dated May 2, 2006 from Human Resource Associates be

DATE	DOCKET NUMBER	PROCEEDINGS
		forwarded by the Probation Department to the Bureau of Prisons as to defendant Jason Louis Tinklenberg; signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 12/14/2006)
12/14/06	135	MOTION to compel *Defendant to Pay Restitution* by USA as to Jason Louis Tinklenberg (Attachments: # 1 Exhibit Receipt for Cleanup) (Woods, Julie) (Entered: 12/14/2006)
12/14/06		Copy of Order, 134 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (rlw,) (Entered: 12/14/2006)
12/15/06	136	ORDER granting motion to compel payment of restitution 135 as to Jason Louis Tinklenberg (1); signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 12/15/2006)
12/15/06	137	JUDGMENT as to defendant Jason Louis Tinklenberg; signed by Senior Judge Richard Alan Enslen (Senior Judge Richard

DATE	DOCKET NUMBER	PROCEEDINGS
		Alan Enslen, blb) (Entered: 12/15/2006)
12/15/06		Certified copies of Judgment 137 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg, Richard D. Stroba, Julie Ann Woods, USM (rlw,) (Entered: 12/15/2006)
12/18/06		Appeal packet consisting of the docket sheet and notice of appeal as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (rlw,) (Entered: 12/18/2006)
12/18/06	139	NOTICE OF APPEAL by Jason Louis Tinklenberg re Judgment 137 (Attachments:, # 1 Attachment) (rlw,) (Entered: 12/19/2006)
12/18/06	140	TRANSCRIPT REQUEST by Jason Louis Tinklenberg for proceedings held on 8/14/06; 8/15/06; 8/16/06 before Judge Richard Alan Enslen, re Notice of Appeal - Final Judgment 139 (rlw,) (Entered: 12/19/2006)
12/19/06		Electronically notified Court Report of Transcript Request - Ap-

DATE	DOCKET NUMBER	PROCEEDINGS
		peal 140 as to defendant Jason Louis Tinklenberg; hard copy of CJA 24 Authorization and Voucher for Payment of Transcript forwarded to Court Reporter (rlw,) (Entered: 12/19/2006)
12/19/06		Appeal packet consisting of the docket sheet and Notice of Appeal - Final Judgment 139 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (rlw,) (Entered: 12/19/2006)
12/19/06		CASE NUMBER 06-2624 assigned by Sixth Circuit Court of Appeals to appeal 138 as to defendant Jason Louis Tinklenberg (kad,) (Entered: 01/04/2007)
12/21/06	141	MOTION to exclude *(disregard) the sealed psychiatric report* by Jason Louis Tinklenberg; (Attachments:, # 1 Attachment) (rlw,) (Entered: 12/21/2006)
12/22/06	142	MOTION for reconsideration re 136 Order on Motion to Compel *payment of restitution* by Jason

DATE	DOCKET NUMBER	PROCEEDINGS
		Louis Tinklenberg; (acr,) (Entered: 12/22/2006)
12/22/06	143	MOTION to appoint counsel *for appeal* by Jason Louis Tinklenberg; (acr,) (Entered: 12/26/2006)
12/27/06	144	MOTION for reconsideration re 136 Order on Motion to Compel *defendant to pay restitution for hazardous material cleanup* by Jason Louis Tinklenberg; (rlw,) (Entered: 12/28/2006)
1/4/07	145	MOTION to vacate *sentence* by Jason Louis Tinklenberg; (rlw,) (Entered: 01/05/2007)
1/4/07	146	MOTION for fee *funding for an independant laboratory expert* by Jason Louis Tinklenberg; (rlw,) (Entered: 01/05/2007)
1/4/07	147	MOTION to dismiss *because of insufficient evidence* by Jason Louis Tinklenberg; (rlw,) (Entered: 01/05/2007)
1/4/07	151	ORDER of USCA granting Richard Stroba's motion to withdraw as counsel as to Jason Louis Tinklenberg re Notice of Appeal

DATE	DOCKET NUMBER	PROCEEDINGS
		- Final Judgment 138 (rlw,) Modified text on 1/11/2007 (rlw,). (Entered: 01/11/2007)
1/5/07	150	ORDER of USCA (certified copy) as to Jason Louis Tinklenberg re Notice of Appeal - Final Judgment 139 *dismissed as duplicative* (rlw,) (Entered: 01/09/2007)
1/8/07	148	ORDER denying motion to disregard sealed psychiatric evaluation 141 as to Jason Louis Tinklenberg (1); signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 01/08/2007)
1/8/07	149	ORDER denying motions for reconsideration of restitution 142 & 144 as to Jason Louis Tinklenberg (1); signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 01/08/2007)
1/8/07		Copy of Order on Motion to Exclude 148, Order on Motion for Reconsideration, 149 as to defendant Jason Louis Tinklenberg

DATE	DOCKET NUMBER	PROCEEDINGS
		mailed to Jason Louis Tinklenberg (rlw,) (Entered: 01/08/2007)
1/22/07	152	ORDER denying without prejudice motion to vacate sentence 145 as to Jason Louis Tinklenberg (1); denying without prejudice motion for funding 146 as to Jason Louis Tinklenberg (1); denying without prejudice motion to dismiss 147 as to Jason Louis Tinklenberg (1); signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 01/22/2007)
1/22/07		Copy of Order on Motion to Vacate, Order on Motion for Fee, Order on Motion to Dismiss, 152 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (rlw) (Entered: 01/22/2007)
1/22/07	153	LETTER from Jason Louis Tinklenberg *requesting a copy of his docket sheet* re Jason Louis Tinklenberg *(copy of docket sheet mailed this date)* (rlw) (Entered: 01/22/2007)

DATE	DOCKET NUMBER	PROCEEDINGS
2/7/07	154	NOTICE from CCA of appointment of attorney Robert J. Dunn for defendants Jason Louis Tinklenberg on appeal; attorney Richard D. Stroba is granted leave to withdraw from the appellate proceedings (mrs) Modified text on 2/7/2007 (mrs,). Modified text on 2/12/2007 (mrs,). (Entered: 02/07/2007)
2/16/07	155	CHANGE OF ADDRESS by defendant Jason Louis Tinklenberg to c/o Carol Danhauser, 222 S. Kendall Ave., #21, Kalamazoo, MI 49006 (rlw) (Entered: 02/16/2007)
3/22/07	156	TRANSCRIPT of the Hearing held October 16, 2006 before the Honorable Richard Alan Enslen as to Jason Louis Tinklenberg (Court Reporter: K. Thomas, (269) 385-3050) (Entered: 03/22/2007)
3/22/07	157	TRANSCRIPT of the Sentencing Hearing held December 13, 2006, before the Honorable Richard Alan Enslen as to Jason Louis Tinklenberg (Court Reporter: K.

DATE	DOCKET NUMBER	PROCEEDINGS
		Thomas, (269) 385-3050) (Entered: 03/22/2007)
3/23/07	158	JUDGMENT RETURNED EXECUTED as to Jason Louis Tinklenberg on 3/9/07 (rlw) (Entered: 03/26/2007)
3/30/07	159	LETTER from defendant Jason Louis Tinklenberg requesting a copy of the receipt for hazardous material cleanup 135 (defendant advised in writing that the receipt is five pages long and we require advance payment in the amount of $2.50 for copy fees) re Jason Louis Tinklenberg (rlw) (Entered: 04/02/2007)
4/2/07	160	LETTER from defendant Jason Louis Tinklenberg requesting a copy of the docket sheet (defendant advised in writing that the docket sheet is 18 pages long and we require advance payment in the amount of $9.00 for copy fee) re Jason Louis Tinklenberg (rlw) (Entered: 04/02/2007)
4/4/07	161	ORDER REJECTING PLEADING; signed by Senior Judge Richard Alan Enslen (Attach-

DATE	DOCKET NUMBER	PROCEEDINGS
		ments: # 1 proposed documents) (acr) (Entered: 04/04/2007)
4/4/07		Copy of Order Rejecting Pleading 161 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg with original proposed documents (acr) Modified text on 4/4/2007 (acr,). (Entered: 04/04/2007)
4/6/07	162	ORDER REJECTING PLEADING; signed by Senior Judge Richard Alan Enslen (Attachments: # 1 Proposed Document) (acr) (Entered: 04/06/2007)
4/6/07		Copy of Order Rejecting Pleading 162 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg with original proposed document (acr) Modified text on 4/6/2007 (acr,). (Entered: 04/06/2007)
4/9/07	163	LETTER from defendant Jason Tinklenberg requesting copy of docket sheet and forms with response from Clerk; mailed updated portion of docket sheet re Jason Louis Tinklenberg (acr) (Entered: 04/10/2007)

DATE	DOCKET NUMBER	PROCEEDINGS
6/19/07	164	ORDER REJECTING paper document; signed by Senior Judge Richard Alan Enslen (Attachments: # 1 Attachment letter from defendant) (rlw) (Entered: 06/19/2007)
6/19/07		Copy of Order Rejecting Paper Document 164 with proposed document as to defendant Jason Louis Tinklenberg mailed to Jason Tinklenberg (rlw) Modified text on 6/21/2007 (rlw,). (Entered: 06/21/2007)
8/27/07	165	NOTICE of appointment of representation of defendant Jason Louis Tinklenberg on appeal, Jason Tinklenberg to proceed pro se; attorney Robert J. Dunn is granted leave to withdraw from the appellate proceedings (mrs) Modified text on 8/29/2007 (mrs,). (Entered: 08/29/2007)
9/12/07	166	MOTION for bond *pending appeal with expedited treatment* by Jason Louis Tinklenberg; (Attachments: # 1 Attachment) (rlw) (Entered: 09/14/2007)

DATE	DOCKET NUMBER	PROCEEDINGS
9/18/07	167	LETTER from Jason Tinklenberg regarding release pending appeal re Jason Louis Tinklenberg (rlw) (Entered: 09/18/2007)
9/24/07	168	ORDER denying motion for bond 166 as to Jason Louis Tinklenberg (1); signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 09/24/2007)
9/25/07		Copy of Order on Motion for Bond 168 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (rlw) (Entered: 09/25/2007)
10/4/07	169	MOTION to strike *for failure to serve* by Jason Louis Tinklenberg; (Attachments: # 1 Exhibit D# 2 Exhibit E# 3 Exhibit F# 4 Exhibit G) (dfw) (Entered: 10/05/2007)
10/11/07	170	MOTION to include document(s) in court record by USA as to Jason Louis Tinklenberg #12507-040 (Attachments: # 1 Exhibit) (Woods, Julie) (Entered: 10/11/2007)

DATE	DOCKET NUMBER	PROCEEDINGS
10/11/07	171	PROPOSED ORDER re 170 *inclusion of document into certified record for the purposes of appeal* by USA as to Jason Louis Tinklenberg #12507-040 (Woods, Julie) Modified capitalization on 10/12/2007 (rlw,). (Entered: 10/11/2007)
10/11/07	172	CERTIFICATE OF SERVICE by USA as to Jason Louis Tinklenberg #12507-040 re MOTION to include document(s) in court record 170, PROPOSED ORDER re 170 *inclusion of document into certified record for the purposes of appeal* by USA as to Jason Louis Tinklenberg #12507-040 171 (Woods, Julie) Modified capitalization on 10/12/2007 (rlw,). (Entered: 10/11/2007)
10/25/07	173	MOTION to include document(s) in court record *for purposes of appeal* by Jason Louis Tinklenberg #12507-040; (Attachments: # 1 Attachment Letter regarding USMS FOIA# 2 Attachment Second Motion to Include Specified Documents in the

DATE	DOCKET NUMBER	PROCEEDINGS
		certified record for the purpose of appeal# 3 Attachment Order# 4 Attachment Amended Second Request for Extension of Time to Complete Psychological and Competency Evaluation# 5 Attachment two letters)(rlw) (Entered: 10/25/2007)
11/6/07	174	ORDER granting motion to include document(s) in court record 170 as to Jason Louis Tinklenberg #12507-040 (1); the transcript of video deposition of Joshua Hawk is certified as having been admitted and may be included in the certified record for purposes of appeal; signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, b1b) (Entered: 11/06/2007)
11/6/07	175	EXHIBIT *(Video Deposition Transcript as to Joshua Howk, witness)* by plaintiff USA (gjf) (Entered: 11/07/2007)
11/9/07	176	INFORMATION COPY from USCA as to Jason Louis Tinklenberg #12507-040 re judgment

DATE	DOCKET NUMBER	PROCEEDINGS
		137 *reinstating appeal 06 2646* (rlw) (Entered: 11/15/2007)
11/9/07		ORDER of USCA (see entry 176) as to Jason Louis Tinklenberg #12507-040 reinstating appeal re Notice of Appeal - Final Judgment 139 (rlw) Modified text on 11/15/2007 (rlw,). (Entered: 11/15/2007)
11/20/07	177	ORDER denying motion to strike and motion for reconsideration 169 as to Jason Louis Tinklenberg #12507-040 (1); denying as unnecessary motion to include the June 7, 2006 hearing transcript record and denying request to supplement the record with U.S. Marshals' Prison Tracking System documents 173 as to Jason Louis Tinklenberg #12507-040 (1); signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 11/20/2007)
11/20/07		Copy of Order on Motion to Include Document(s) in Court Record, Order on Motion to Include Document(s) in Court Record

DATE	DOCKET NUMBER	PROCEEDINGS
		174, Order on Motion to Strike, Order on Motion to Include Document(s) in Court Record, Order on Motion to Include Document(s) in Court Record 177 as to defendant Jason Louis Tinklenberg #12507-040 mailed to Jason Louis Tinklenberg (rlw) (Entered: 11/20/2007)
12/11/07	178	RETURNED MAIL: Copy of Order on Motion to Include Document(s) in Court Record, Order on Motion to Include Document(s) in Court Record 174 177 that was sent via U.S. Mail to FCI McKean returned to the Court marked no longer at the Federal Correctional Institution McKean; remailed to Commmunity Corrections at Milan, MI (rlw) Modified text on 12/11/2007 (rlw). (Entered: 12/11/2007)
2/19/08	179	ORDER of USCA as to Jason Louis Tinklenberg #12507-040 re Notice of Appeal - Final Judgment 139 *denying defendant's motion for release on bond pending appeal* (rlw) Modified text on

DATE	DOCKET NUMBER	PROCEEDINGS
		2/21/2008 (rlw). (Entered: 02/21/2008)
3/26/08	180	NOTICE of appointment of attorney Kevin M. Schad for Jason Louis Tinklenberg on appeal (rlw) Modified text on 3/28/2008 (rlw). (Entered: 03/28/2008)
4/28/08	182	PROBATION PETITION and ORDER as to Jason Louis Tinklenberg #12507-040 that a warrant should issue ; signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) Modified text on 4/29/2008 (dmh). (Entered: 04/28/2008)
4/29/08		ORDER APPOINTING FEDERAL PUBLIC DEFENDER as counsel for defendant Jason Louis Tinklenberg #12507-040; signed by Magistrate Judge Timothy P. Greeley (Magistrate Judge Timothy P. Greeley, kad) (Entered: 04/29/2008)
4/29/08	184	ORDER SCHEDULING PROGRESSION OF CASE as to defendant Jason Louis Tinklenberg #12507-040: preliminary hearing

DATE	DOCKET NUMBER	PROCEEDINGS
		set for 5/1/2008 at 04:00 PM at 792 Federal Building, Grand Rapids, MI before Magistrate Judge Timothy P. Greeley; detention hearing set for 5/1/2008 at 04:00 PM at 792 Federal Building, Grand Rapids, MI before Magistrate Judge Timothy P. Greeley; signed by Magistrate Judge Timothy P. Greeley (Magistrate Judge Timothy P. Greeley, kad) (Entered: 04/29/2008)
4/29/08		ARREST of Jason Louis Tinklenberg #12507-040 (pjc) (Entered: 04/29/2008)
4/29/08	185	ARREST WARRANT RETURNED EXECUTED; defendant Jason Louis Tinklenberg #12507-040 arrested on 4/29/08 (pjc) (Entered: 04/29/2008)
4/29/08	186	MINUTES of FIRST APPEARANCE RE REVOCATION of Supervised Release for defendant Jason Louis Tinklenberg #12507-040; held before Magistrate Judge Timothy P. Greeley (Proceedings Digitally Recorded)

DATE	DOCKET NUMBER	PROCEEDINGS
		(Magistrate Judge Timothy P. Greeley, pjc) (Entered: 04/29/2008)
4/30/08		Federal Public Defender recommends that Keith W. Turpel be appointed to represent defendant Jason Louis Tinklenberg #12507-040(Federal Public Defender,) (Entered: 04/30/2008)
4/30/08	187	CJA 20 APPOINTMENT of attorney Keith W. Turpel for Jason Louis Tinklenberg #12507-040; signed by Magistrate Judge Timothy P. Greeley (Magistrate Judge Timothy P. Greeley, kad) Modified text on 8/18/2009 (ald). (Entered: 04/30/2008)
5/1/08	188	MINUTES of DETENTION hearing and PRELIMINARY hearing on revocation as to defendant Jason Louis Tinklenberg #12507-040: defendant waives preliminary hearing; detention hearing conducted; court denies defendant's request for release; defendant ordered detained pending revocation hearing; held before Magistrate Judge Timo-

DATE	DOCKET NUMBER	PROCEEDINGS
		thy P. Greeley (Proceedings Digitally Recorded) (Magistrate Judge Timothy P. Greeley, pjc) (Entered: 05/01/2008)
5/2/08	189	NOTICE as to Jason Louis Tinklenberg #12507-040: final hearing re revocation of supervised release set for 5/16/2008 at 10:00 AM at 114 Federal Building, Kalamazoo, MI before Senior Judge Richard Alan Enslen; (Senior Judge Richard Alan Enslen, blb) (Entered: 05/02/2008)
5/12/08	192	MOTION to appoint counsel, MOTION to allow Keith Turpel to withdraw as attorney by Jason Louis Tinklenberg #12507 040 (dfw) Modified on text 5/22/2008 (dfw). (Entered: 05/22/2008)
5/16/08	190	MINUTES of final hearing regarding revocation of supervised release as to defendant Jason Louis Tinklenberg #12507-040; hearing continued; held before Judge Paul L. Maloney (Court Reporter: Kathleen Thomas) (Judge Paul L. Maloney, acr) (Entered: 05/16/2008)

DATE	DOCKET NUMBER	PROCEEDINGS
5/16/08	191	NOTICE as to Jason Louis Tinklenberg #12507 040: final hearing re revocation of supervised release set for 5/30/2008 at 02:00 PM at 174 Federal Building, Kalamazoo, MI before Judge Paul L. Maloney (Judge Paul L. Maloney, acr) (Entered: 05/16/2008)
5/27/08	193	APPEAL TRANSCRIPT of the Final Pretrial Hearing as to defendant held August 7, 2006, before the Honorable Richard Alan Enslen re appeal 180; NOTE: this transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the release of transcript restriction date; after that date it may be obtained through PACER; under the Policy Regarding Transcripts the parties have 10 days within which to file a Notice of Intent to Request Redaction, and 21 days within which to file a Redaction Request; if no Redaction Request is filed, the court will assume redaction of personal identifiers is

DATE	DOCKET NUMBER	PROCEEDINGS
		not necessary and this transcript will be made available via PACER after the Release of Transcript Restriction set for 8/25/2008. Redaction Request due 6/17/2008. (Court Reporter: K. Thomas, (269) 385-3050) (Entered: 05/27/2008)
5/27/08	194	NOTICE that this case as to defendant Jason Louis Tinklenberg #12507-040 is reassigned to Judge Paul L. Maloney for all further proceedings pursuant to Administrative Order Number 08-074; Senior Judge Richard Alan Enslen no longer assigned to case (rlw) (Entered: 05/27/2008)
5/30/08	195	LETTER from Jason Tinklenberg regarding his attorney re Jason Louis Tinklenberg #12507-040 (rlw) (Entered: 05/30/2008)
5/30/08	196	MINUTES of final hearing regarding revocation of supervised release as to defendant Jason Louis Tinklenberg #12507-040 held before Judge Paul L.

DATE	DOCKET NUMBER	PROCEEDINGS
		Maloney (Court Reporter: Kathleen Thomas) (Judge Paul L. Maloney, acr) (Entered: 05/30/2008)
5/30/08	198	ACKNOWLEDGMENT of receipt of appeal packet by Jason Louis Tinklenberg #12507-040 (dfw) Modified date on 6/2/2008 (dfw). (Entered: 06/02/2008)
6/2/08	197	JUDGMENT FOR REVOCATION of Supervised Release as to Jason Louis Tinklenberg #12507-040; signed by Judge Paul L. Maloney (Judge Paul L. Maloney, acr) (Entered: 06/02/2008)
6/2/08		Certified Copy of Judgment for Revocation of Probation/Supervised Release 197 as to defendant Jason Louis Tinklenberg #12507-040 mailed to Julie Ann Woods, Keith W. Turpel, USM (dfw) (Entered: 06/02/2008)
6/3/08	199	ORDER dismissing as withdrawn motion to appoint counsel 192 as to Jason Louis Tinklenberg #12507-040 (1); dismissing as withdrawn motion to withdraw

DATE	DOCKET NUMBER	PROCEEDINGS
		as attorney 192 as to Jason Louis Tinklenberg #12507-040 (1); signed by Judge Paul L. Maloney (Judge Paul L. Maloney, acr) (Entered: 06/03/2008)
6/4/08	200	LETTER from Jason Louis Tinklenberg re his sentence Jason Louis Tinklenberg #12507-040 (dfw) Modified text on 6/5/2008 (dfw). (Entered: 06/05/2008)
6/4/08	201	MOTION for reconsideration *Titled "Motion for rehearing for supervised release revocation hearing"* by Jason Louis Tinklenberg #12507-040 (dfw) (Entered: 06/05/2008)
6/6/08	202	ORDER denying motion for reconsideration 201 as to Jason Louis Tinklenberg #12507-040 (1); signed by Judge Paul L. Maloney (Judge Paul L. Maloney, acr) (Entered: 06/06/2008)
6/6/08		Copy of Order on Motion for Reconsideration 202 as to defendant Jason Louis Tinklenberg #12507-040 mailed to Jason

DATE	DOCKET NUMBER	PROCEEDINGS
		Louis Tinklenberg (dfw) (Entered: 06/06/2008)
6/6/08	203	MOTION for stay of sentence by Jason Louis Tinklenberg #12507-040 (dfw) (Entered: 06/06/2008)
6/6/08	204	NOTICE OF APPEAL by Jason Louis Tinklenberg #12507-040 re Judgment for Revocation of Probation/Supervised Release 197 (dfw) (Entered: 06/10/2008)
6/10/08	205	ORDER denying motion for stay of sentence 203 as to Jason Louis Tinklenberg #12507-040 (1); signed by Judge Paul L. Maloney (Judge Paul L. Maloney, acr) (Entered: 06/11/2008)
6/12/08		CASE NUMBER 08-1765 assigned by the Sixth Circuit to appeal 204 as to defendant Jason Louis Tinklenberg #12507-040 (elc) (Entered: 06/17/2008)
6/16/08	206	MOTION to reduce sentence by Jason Louis Tinklenberg #12507-040 (rlw) (Entered: 06/16/2008)

DATE	DOCKET NUMBER	PROCEEDINGS
6/17/08	207	ORDER denying motion to reduce sentence 206 as to Jason Louis Tinklenberg #12507-040 (1); signed by Judge Paul L. Maloney (Judge Paul L. Maloney, acr) (Entered: 06/17/2008)
6/17/08	208	MOTION to inspect *(titled oversight and inquiry of the supervised release violation)* by Jason Louis Tinklenberg #12507-040 (rlw) (Entered: 06/19/2008)
6/17/08	209	EXHIBIT re 208 *to motion for oversight and inquiry of the supervised release violation* by defendant Jason Louis Tinklenberg #12507-040 (rlw) (Entered: 06/19/2008)
6/18/08		Copy of Order on Motion for Stay 205, Order on Motion to Reduce Sentence 207 as to defendant Jason Louis Tinklenberg #12507-040 mailed to Jason Louis Tinklenberg (rlw) (Entered: 06/18/2008)
6/26/08	210	RETURNED MAIL: Copy of Order on Motion for Stay 205, Order on Motion to Reduce Sen-

DATE	DOCKET NUMBER	PROCEEDINGS
		tence 207 that was sent via U.S. Mail to Jason Louis Tinklenberg returned to the Court marked undeliverable as addressed, unable to forward; remailed to White Cloud address (rlw) (Entered: 06/27/2008)
7/7/08	211	RETURNED MAIL: Copy of Order on Motion for Stay 205, Order on Motion to Reduce Sentence 207 that was sent via U.S. Mail to Jason Louis Tinklenberg returned to the Court marked Refused - unable to forward; remailed to USP Terre Haute (rlw) (Entered: 07/07/2008)
7/28/08	212	APPEAL TRANSCRIPT of the Detention Hearing as to defendant Jason Louis Tinklenberg #12507-040 held May 1, 2008, before Magistrate Timothy P. Greeley re appeal 204; NOTE: this transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the release of transcript restriction

DATE	DOCKET NUMBER	PROCEEDINGS
		date; after that date it may be obtained through PACER; under the Policy Regarding Transcripts the parties have 10 days within which to file a Notice of Intent to Request Redaction, and 21 days within which to file a Redaction Request; if no Redaction Request is filed, the court will assume redaction of personal identifiers is not necessary and this transcript will be made available via PACER after the release of transcript restriction set for 10/27/2008; redaction request due 8/18/2008 (Court Reporter/ Transcriptionist: K. Thomas, (269) 385-3050) (Entered: 07/28/2008)
7/28/08	213	APPEAL TRANSCRIPT of the Supervised Release Violation Hearing as to defendant Jason Louis Tinklenberg #12507-040 held May 16, 2008, before the Honorable Paul L. Maloney re appeal 204; NOTE: this transcript may be viewed at the court public terminal or purchased through the Court Reporter/

DATE	DOCKET NUMBER	PROCEEDINGS
		Transcriber before the release of transcript restriction date; after that date it may be obtained through PACER; under the Policy Regarding Transcripts the parties have 10 days within which to file a Notice of Intent to Request Redaction, and 21 days within which to file a Redaction Request; if no Redaction Request is filed, the court will assume redaction of personal identifiers is not necessary and this transcript will be made available via PACER after the release of transcript restriction set for 10/27/2008; redaction request due 8/18/2008 (Court Reporter/ Transcriptionist: K. Thomas, (269) 385-3050) (Entered: 07/28/2008)
7/28/08	214	APPEAL TRANSCRIPT of the Continued Supervised Release Violation Hearing as to defendant Jason Louis Tinklenberg #12507-040 held May 30, 2008, before the Honorable Paul L. Maloney re appeal 204; NOTE: this transcript may be viewed at

DATE	DOCKET NUMBER	PROCEEDINGS
		the court public terminal or purchased through the Court Reporter/Transcriber before the release of transcript restriction date; after that date it may be obtained through PACER; under the Policy Regarding Transcripts the parties have 10 days within which to file a Notice of Intent to Request Redaction, and 21 days within which to file a Redaction Request; if no Redaction Request is filed, the court will assume redaction of personal identifiers is not necessary and this transcript will be made available via PACER after the release of transcript restriction set for 10/27/2008; redaction request due 8/18/2008 (Court Reporter/ Transcriptionist: K. Thomas, (269) 385-3050) (Entered: 07/28/2008)
8/14/08	215	CCA NOTICE of appointment of attorney Kevin M. Schad for Jason Louis Tinklenberg # and 12507-040 on appeal, attorney Keith W. Turpel is granted leave to withdraw from the appellate

DATE	DOCKET NUMBER	PROCEEDINGS
		proceedings (dfw) (Entered: 08/15/2008)
8/20/08	216	MOTION for reconsideration *Titled "Motion for Default Judgment" with certificate of service* by Jason Louis Tinklenberg #12507-040 (dfw) (Entered: 08/20/2008)
8/22/08	218	ORDER dismissing motion to inspect 208 as to Jason Louis Tinklenberg #12507-040 (1) and dismissing motion for reconsideration 216 as to Jason Louis Tinklenberg #12507-040 (1); signed by Chief Judge Paul L. Maloney (Chief Judge Paul L. Maloney, aeb) (Entered: 08/26/2008)
8/25/08	217	RESPONSE to motion by USA as to Jason Louis Tinklenberg #12507-040 re MOTION for reconsideration *Titled "Motion for Default Judgment" with certificate of service* 216 (Woods, Julie) (Entered: 08/25/2008)
8/26/08		Copy of Order on Motion to InspectOrder on Motion for Reconsideration 218 as to defendant Jason Louis Tinklenberg

DATE	DOCKET NUMBER	PROCEEDINGS
		#12507-040 mailed to Jason Lewis Tinklenberg (rlw) (Entered: 08/26/2008)
9/2/08	219	MOTION to reduce sentence *with certificate of service* by Jason Louis Tinklenberg #12507-040 (Attachments: # 1 Proposed Order) (dfw) (Entered: 09/02/2008)
9/3/08	220	ORDER dismissing motion to reduce sentence 219 as to Jason Louis Tinklenberg #12507-040 (1); signed by Chief Judge Paul L. Maloney (Chief Judge Paul L. Maloney, acr) (Entered: 09/03/2008)
9/4/08		Copy of Order on Motion to Reduce Sentence 220 as to defendant Jason Louis Tinklenberg #12507-040 mailed to Jason Louis Tinklenberg (rlw) (Entered: 09/04/2008)
9/15/08		ACKNOWLEDGMENT of appeal transcript order from Mr. Kevin M. Schad received 9-11-08 re appeal 204 filed by Jason Louis Tinklenberg #12507-040; transcript is estimated at 20

DATE	DOCKET NUMBER	PROCEEDINGS
		pages with an estimated completion date of 9-16-08; arrangements for payment made on 9-11-08 (Court Reporter/Transcriptionist: Anderson, Kathy (616) 914-2384) (Entered: 09/15/2008)
9/22/08	221	ORDER REJECTING paper document; signed by Chief Judge Paul L. Maloney (Attachments: # 1 Proposed Document motion for guideance [sic] and action from the court) (rlw) (Entered: 09/23/2008)
9/23/08		Copy of Order Rejecting Paper Document 221 as to defendant Jason Louis Tinklenberg #12507-040 mailed to Jason Louis Tinklenberg (rlw) (Entered: 09/23/2008)
9/24/08		ACKNOWLEDGMENT of appeal transcript order from Mr. Kevin M. Schad received 9-11-08 re appeal 204 filed by Jason Louis Tinklenberg #12507-040; transcript is estimated at 8 pages with an estimated completion date of 9-24-08; arrangements for

DATE	DOCKET NUMBER	PROCEEDINGS
		payment made on 9-24-08 (Court Reporter/Transcriptionist: Anderson, Kathy (616) 914-2384) (Entered: 09/24/2008)
9/24/08	222	APPEAL TRANSCRIPT of First Appearance Proceedings as to defendant Jason Louis Tinklenberg #12507-040 held April 29, 2008 before Magistrate Timothy Greeley re appeal 204; NOTE: this transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the release of transcript restriction date; after that date it may be obtained through PACER; under the Policy Regarding Transcripts the parties have 10 days within which to file a Notice of Intent to Request Redaction, and 21 days within which to file a Redaction Request; if no Redaction Request is filed, the court will assume redaction of personal identifiers is not necessary and this transcript will be made available via PACER after the release of tran-

DATE	DOCKET NUMBER	PROCEEDINGS
		script restriction set for 12/23/2008; redaction request due 10/15/2008 (Court Reporter/Transcriptionist: Anderson, Kathy (616) 914-2384) (Entered: 09/24/2008)
9/30/08	223	APPEAL TRANSCRIPT of CORRECTED TRANSCRIPT replacing Docket Entry No. 214 - Corrected Transcript for Error on Page 21 of Continued Supervised Release Violation Hearing as to defendant Jason Louis Tinklenberg #12507-040 held May 30, 2008, before the Honorable Paul L. Maloney re appeal 204; NOTE: this transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the release of transcript restriction date; after that date it may be obtained through PACER; under the Policy Regarding Transcripts the parties have 10 days within which to file a Notice of Intent to Request Redaction, and 21 days within which to file a Redaction Re-

DATE	DOCKET NUMBER	PROCEEDINGS
		quest; if no Redaction Request is filed, the court will assume redaction of personal identifiers is not necessary and this transcript will be made available via PACER after the release of transcript restriction set for 12/29/2008; redaction request due 10/21/2008 (Court Reporter/ Transcriptionist: K. Thomas, (269) 385-3050) (Entered: 09/30/2008)
10/9/08	224	LETTER from Supreme Court of the United States that a petition for writ of certiorari was filed on August 21, 2008 and assigned case number 08-6528 re Notice of Appeal - Post Judgment 204 filed by defendant Jason Louis Tinklenberg #12507-040 (dfw) (Entered: 10/14/2008)
12/30/08	225	ORDER of USCA (copy) as to Jason Louis Tinklenberg #12507-040 re Notice of Appeal - Post Judgment 204, Notice of Appeal - Final Judgment 138 (dfw) Modified text on 12/31/2008 (dfw). (Entered: 12/31/2008)

DATE	DOCKET NUMBER	PROCEEDINGS
5/19/09	226	ATTORNEY APPEARANCE of Richard D. Stroba for defendant Jason Louis Tinklenberg #12507-040 (Stroba, Richard) (Entered: 05/19/2009)
5/27/09	228	PROBATION PETITION and ORDER as to Jason Louis Tinklenberg #12507-040 that a warrant should issue; signed by Chief Judge Paul L. Maloney (Chief Judge Paul L. Maloney, acr) Modified text on 6/4/2009 (dmh). (Entered: 05/27/2009)
6/3/09		ARREST of Jason Louis Tinklenberg #12507-040 (dmh) (Entered: 06/04/2009)
6/4/09	230	ARREST WARRANT RETURNED EXECUTED; defendant Jason Louis Tinklenberg #12507-040 arrested on 6/3/2009 (dmh) (Entered: 06/04/2009)
6/4/09		(NON-DOCUMENT) ORDER APPOINTING FEDERAL PUBLIC DEFENDER as counsel for defendant Jason Louis Tinklenberg #12507-040; signed by Magistrate Judge Joseph G. Scoville (Magistrate Judge Jo-

DATE	DOCKET NUMBER	PROCEEDINGS
		seph G. Scoville, mmh) (Entered: 06/04/2009)
6/4/09	231	NOTICE OF HEARING as to Jason Louis Tinklenberg #12507-040: preliminary revocation hearing and detention hearing set for 6/8/2009 at 10:00 AM at 740 Federal Building, Grand Rapids, MI before Magistrate Judge Joseph G. Scoville (Magistrate Judge Joseph G. Scoville, mmh) (Entered: 06/04/2009)
6/4/09	232	MINUTES held before Magistrate Judge Joseph G. Scoville; FIRST APPEARANCE RE REVOCATION of Supervised Release for defendant Jason Louis Tinklenberg; deft's request for court appointed counsel granted; deft remanded to custody of USM pending further proceedings before the magistrate judge; (Proceedings Digitally Recorded) (Magistrate Judge Joseph G. Scoville, dmh) (Entered: 06/04/2009)
6/8/09	233	MINUTES held before Magistrate Judge Joseph G. Scoville;

DATE	DOCKET NUMBER	PROCEEDINGS
		PRELIMINARY hearing on revocation and DETENTION hearing as to defendant Jason Louis Tinklenberg; testimony of USPO Krista Ives; probable cause found and deft is bound over for revocation proceedings before the district judge; deft remanded to custody of USM; (Proceedings Digitally Recorded) (Magistrate Judge Joseph G. Scoville, dmh) (Entered: 06/08/2009)
6/8/09	234	ORDER that defendant Jason Louis Tinklenberg #12507-040 is bound over for further proceedings before the district judge; defendant is committed to the custody of the Attorney General until further order of the court; signed by Magistrate Judge Joseph G. Scoville (Magistrate Judge Joseph G. Scoville, mmh) (Entered: 06/08/2009)
6/9/09	235	NOTICE as to Jason Louis Tinklenberg #12507-040: final hearing re revocation of supervised release set for 7/2/2009 at 10:00 AM at 174 Federal Building, Kalamazoo, MI before Chief

DATE	DOCKET NUMBER	PROCEEDINGS
		Judge Paul L. Maloney (Chief Judge Paul L. Maloney, acr) (Entered: 06/09/2009)
7/1/09	236	MEMORANDUM regarding violation proceedings as to Jason Louis Tinklenberg #12507-040 (Stroba, Richard) (Entered: 07/01/2009)
7/1/09	237	*AMENDED* MEMORANDUM regarding violation proceedings as to Jason Louis Tinklenberg #12507-040 (Stroba, Richard) (Entered: 07/01/2009)
7/2/09	238	MINUTES of final hearing regarding revocation of supervised release as to defendant Jason Louis Tinklenberg #12507-040 held before Chief Judge Paul L. Maloney; hearing adjourned for status conference in 30 days; defendant released on a $50,000 unsecured appearance bond (Court Reporter: Kathleen Thomas) (Chief Judge Paul L. Maloney, acr) (Entered: 07/02/2009)

DATE	DOCKET NUMBER	PROCEEDINGS
7/2/09	239	NOTICE OF HEARING as to Jason Louis Tinklenberg #12507-040 status conference set for 8/10/2009 at 11:00 AM at 174 Federal Building, Kalamazoo, MI before Chief Judge Paul L. Maloney (Chief Judge Paul L. Maloney, acr) (Entered: 07/02/2009)
7/2/09	240	BOND and ORDER setting conditions of release for defendant Jason Louis Tinklenberg #12507-040 (1) appearance bond; signed by Chief Judge Paul L. Maloney (rlw) Modified text on 10/13/2009 (dfw). (Entered: 07/02/2009)
7/10/09	241	LETTER from defendant Jason Louis Tinklenberg regarding his residence re Jason Louis Tinklenberg #12507-040 (dfw) (Entered: 07/10/2009)
7/13/09	242	ORDER REJECTING PLEADING; signed by Chief Judge Paul L. Maloney (Attachments: # 1 Bond Condition Request) (rlw) (Entered: 07/13/2009)

DATE	DOCKET NUMBER	PROCEEDINGS
7/13/09		Copy of Order Rejecting Pleading 242 as to defendant Jason Louis Tinklenberg #12507-040 mailed to Jason Tinklenberg with proposed motion (rlw) (Entered: 07/13/2009)
7/31/09	243	MOTION to modify conditions of release *(to amend terms of appearance bond and conditions of release) by Jason Louis Tinklenberg #12507-040* (Stroba, Richard) Modified text on 8/2/2009 (dfw). (Entered: 07/31/2009)
7/31/09	244	MEMORANDUM in support by Jason Louis Tinklenberg #12507-040 re MOTION to modify conditions of release *(to amend terms of appearance bond and conditions of release)* 243 (Stroba, Richard) Modified text on 8/2/2009 (dfw). (Entered: 07/31/2009)
8/10/09	245	BOND and ORDER setting conditions of release as to defendant Jason Louis Tinklenberg #12507-040 (1) unsecured appearance bond ; signed by Chief

DATE	DOCKET NUMBER	PROCEEDINGS
		Judge Paul L. Maloney (rlw) (Entered: 08/10/2009)
8/10/09	246	MINUTES of status conference as to defendant Jason Louis Tinklenberg #12507-040 held before Chief Judge Paul L. Maloney (Court Reporter: Kathleen Thomas) (Chief Judge Paul L. Maloney, acr) (Entered: 08/10/2009)
8/10/09	247	NOTICE OF HEARING as to Jason Louis Tinklenberg #12507-040 status conference set for 9/14/2009 at 11:00 AM at 174 Federal Building, Kalamazoo, MI before Chief Judge Paul L. Maloney (Chief Judge Paul L. Maloney, acr) (Entered: 08/10/2009)
8/12/09	248	NOTICE rescheduling hearing as to Jason Louis Tinklenberg #12507-040: status conference set for 9/14/2009 at 01:30 PM (instead of 11:00 AM) at 174 Federal Building, Kalamazoo, MI before Chief Judge Paul L. Maloney (Chief Judge Paul L.

DATE	DOCKET NUMBER	PROCEEDINGS
		Maloney, acr) (Entered: 08/12/2009)
8/26/09	249	ATTORNEY APPEARANCE of W. Francesca Ferguson for USA (Ferguson, W.) (Entered: 08/26/2009)
8/26/09	250	APPLICATION for writ of continuing garnishment directed to garnishee State of Michigan as to defendant Jason Louis Tinklenberg #12507-040 (Attachments: *# 1* Proposed Writ of Continuing Garnishment, # 2 Proposed Instructions to Debtor/Clerk's Notice of Post-Judgment Garnishment) (Ferguson, W.) (Entered: 08/26/2009)
8/27/09	251	WRIT of continuing garnishment issued to garnishee State of Michigan Income Tax Refund as to defendant Jason Louis Tinklenberg #12507-040 (gjf) (Entered: 08/27/2009)
8/27/09	252	INSTRUCTIONS to debtor and CLERK'S NOTICE of post-judgment garnishment re writ of continuing garnishment 251 as to defendant Jason Louis Tinklen-

DATE	DOCKET NUMBER	PROCEEDINGS
		berg #12507-040 (gjf) (Entered: 08/27/2009)
9/2/09	253	CERTIFICATE OF SERVICE by USA as to Jason Louis Tinklenberg #12507-040 re Instructions to Debtor and Clerks Notice of Post-Judgment Garnishment 252, Writ of Continuing Garnishment Issued 251, Application for Writ of Continuing Garnishment, 250 (Ferguson, W.) (Entered: 09/02/2009)
9/3/09	254	SLIP OPINION of USCA as to Jason Louis Tinklenberg #12507-040 re appeal 204 *reversing defendant's conviction and remand with instructions to dismiss his indictment with prejudice* (rlw) (Entered: 09/03/2009
9/3/09	256	REPORT and ORDER as to Jason Louis Tinklenberg #12507-040 discharging defendant from supervised release; signed by Chief Judge Paul L. Maloney (Chief Judge Paul L. Maloney, acr) (Entered: 09/03/2009)

DATE	DOCKET NUMBER	PROCEEDINGS
9/3/09	257	JUDGMENT of USCA (certified copy) as to Jason Louis Tinklenberg #12507-040 re Notice of Appeal - Post Judgment 204 (rlw) (Entered: 09/03/2009)
9/3/09	258	ORDER of USCA (certified copy) as to Jason Louis Tinklenberg #12507-040 re Notice of Appeal - Post Judgment 204, Notice of Appeal - Final Judgment 138, Notice of Appeal - Final Judgment 139 *attorney Kevin Schad is granted permission to withdraw as appointed counsel under the Criminal Justice Act. The Office of Federal Public Defender is appointed and Mr. Schad will continue his duties under the auspices of that office.* (dfw) (Entered: 01/19/2010)
1/28/10	259	ORDER of USCA (certified copy) as to Jason Louis Tinklenberg #12507-040 re Notice of Appeal - Post Judgment 204, Notice of Appeal - Final Judgment 139 *appellee's motion to stay the mandate is Ordered denied* (dfw) (Entered: 01/28/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
1/28/10	260	MANDATE of USCA (certified copy) as to Jason Louis Tinklenberg #12507-040 re Notice of Appeal - Post Judgment 204, Notice of Appeal - Final Judgment 139 (dfw) (Entered: 01/28/2010)
2/22/10	262	GARNISHMENT DISCLOSURE from Michigan Department of Treasury showing indebtedness in the amount of $625.00 as to defendant Jason Louis Tinklenberg #12507-040 (blp,) (Entered: 02/24/2010)
2/23/10	261	TERMINATION of garnishment by USA as to Jason Louis Tinklenberg #12507-040 re garnishee State of Michigan and garnishment 252, 251, 250 (Ferguson, W.) (Entered: 02/23/2010)
3/5/10	263	GARNISHMENT DISCLOSURE (Amended) from MI Department of Treasury showing indebtedness in the amount of $.00 (no indebtedness) as to defendant Jason Louis Tinklenberg #12507-040 (bd) Modified text on 3/12/2010 (bd). (Entered: 03/09/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
4/5/10	264	LETTER from Supreme Court of the United States indicating the application for an extension of time to file a petition for a writ of certiorari has been presented to Justice Stevens, who on March 31, 2010 extended the time to and including May 12, 2010. re Jason Louis Tinklenberg #12507-040 (dfw) (Entered: 04/06/2010)
5/4/10	265	LETTER from Supreme Court of the United States indicating the application for an extension of time in this case has been present to Justice Stevens, who on April 27, 2010 extended the time to and including June 11, 2010 re Jason Louis Tinklenberg #12507-040 (blp,) (Entered: 05/04/2010)
6/11/10	266	LETTER from Supreme Court of the United States that the petition for writ of certiorari was filed on 06/08/2010 and assigned case number 09-1498 re Notice of Appeal - Post Judgment 204 filed by defendant Jason Louis Tinklenberg #12507-040, Notice of Appeal - Final Judgment 139

DATE	DOCKET NUMBER	PROCEEDINGS
		filed by Jason Louis Tinklenberg #12507-040 (blp,) Modified text on 6/14/2010 (blp,). (Entered: 06/14/2010)
9/29/10	267	LETTER from Supreme Court of the United States indicating motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted re Jason Louis Tinklenberg #12507-040 (dfw) (Entered: 09/29/2010)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
(SOUTHERN DISTRICT)

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

[Filed: Oct. 20, 2005]

INDICTMENT

The Grand Jury charges:

COUNT 1

On or about January 14, 2005, in Kalamazoo County, in the Western District of Michigan, Southern Division,

JASON LOUIS TINKLENBERG,

having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, the following firearms: a Phoenix Arms .22 caliber pistol, Model number HP22, serial number 4039605, and a Savage Arms, Springfield, Model 67F, twenty gauge, pump action shotgun, with no visible serial number.

18 U.S.C. § 922(g)(1)
18 U.S.C; § 924(a)(2)

COUNT 2

On or about January 14, 2005, in Kalamazoo County, in the Western District of Michigan, Southern Division,

JASON LOUIS TICKLENBERG

did knowingly, intentionally, and unlawfully possess nine hundred sixty-four (964), 30 milligram tablets of pseudoephedrine, three packs of AAA lithium batteries, two 64 ounce cans of Coleman fuel, and Pen Plax plastic tubing, knowing, intending, and having reasonable cause to believe that such items would be used to manufacture methamphetamine, a Schedule II controlled substance, in violation of Subchapter I of chapter 13 of Title 21 of the United States Code.

21 U.S.C. § 843(a)(6)
21 U.S.C § 843(d)(2)

COUNT 3

On or about October 14, 2005, in Kalamazoo County, in the Western District of Michigan, Southern Division,

JASON LOUIS TICKLENBERG

did knowingly, intentionally, and unlawfully possess two 16 ounce bottles of Hydrogen Peroxide, one 16-ounce bottle of rubbing alcohol, two 24-count blister packs of Actifed cold tablets, two 18 count blister packs of cold tablets, two 16-ounce bottles of iodine tincture, one 18-ounce bottle of lye, two 32 ounce cans of acetone, one gallon can of Coleman fuel, and one plastic container of muriatic acid, knowing, intending, and having reasonable cause to believe that such items would be used to manufacture methamphetamine, a Schedule II controlled substance, in violation of Subchapter I of Chapter 13 of Title 21 of the United States Code.

21 U.S.C. § 843(a)(6)
21 U.S.C. § 843(d)

A TRUE BILL
/s/ [ILLEGIBLE]
GRAND JURY FOREPERSON

MARGARET M. CHIARA
United States Attorney

/s/ JULIE ANN WOODS
JULIE ANN WOODS
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Oct. 28, 2005

ORDER

The United States having filed a Notice of Errata, petitioning the Court to allow the Indictment to be Amended to reflect the correct spelling of Defendant's last name, and by leave of this Court,

IT IS HEREBY ORDERED that the Notice of Errata is granted allowing the Indictment to be amended to reflect the correct spelling of the Defendant's last name, to wit: **TINKLENBERG**.

/s/ GORDON J. QUIST

HON. GORDON J. QUIST
United States District Judge
Western District of Michigan

Dated: Oct. 28, 2005

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

Case No. 1:05CR0239

UNITED STATES OF AMERICA

v.

JASON LOUIS TICKLENBERG

[Filed: Oct. 31, 2005]

WARRANT FOR ARREST

GORDON J. QUIST, U.S. District Judge

To: *The United States Marshal and any Authorized United States Officer*

YOU ARE HEREBY COMMANDED TO ARREST *Jason Louis Ticklenberg and bring him or her forthwith to the nearest magistrate to answer a(n)*

x Indictment *__Information* *__Complaint*

__Order of court *__Violation Notice*

__Probation Violation Petition

charging him or her with (brief description of offense)

felon in possession of firearms and possession of methamphetamine manufacturing components in violation

of Titles 18 and 21 United States Code, Section(s) 922(g)(1) and 843(a)(6)

JOSEPH G. SCOVILLE — *Magistrate Judge*
Name of Issuing Officer — *Title of issuing Officer*

_____ — *10-20-05 Grand Rapids, Michigan*
Signature of Issuing Officer — *Date and Location*

/s/ S. COPPLE
(By) Deputy Clerk

RETURN
This warrant was received and executed with the arrest of the above-named defendant at /s/ *Kalanpeod Co Jail*

DATE RECEIVED	NAME AND TITLE OF ARRESTING OFFICER	*SIGNATURE OF ARRESTING OFFICER*
DATE OF ARREST *10/31/05*	*/s/ KAREN L. RIVA - ATF*	/s/ KAREN L. TZ ATF

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:05cr239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Nov. 2, 2005

ORDER SETTING FINAL PRETRIAL AND TRIAL

(*Note recent changes to this Order of Scheduling)

IT IS ORDERED that jury selection and trial shall commence on **January 3, 2006 at 8:30 a.m.**, in the United States District Court, Courtroom 499, Federal Building, 110 Michigan, N.W., Grand Rapids, Michigan. Counsel and the parties shall be present in the courtroom at 8:30 a.m.. to address preliminary matters.

IT IS ORDERED that a final pre-trial conference be held on **December 27, 2005 at 3:30 p.m.**, in the United States District Court, Courtroom 499, Federal Building, 110 Michigan, N.W., Grand Rapids, Michigan. Counsel who will try this case shall appear at the final pretrial conference. The attendance of the defendant is required unless specifically waived.

All pending motions shall be heard at the time of the final pretrial conference on December 27, 2005, unless otherwise notified by the Court.

IT IS FURTHER ORDERED that at the final pretrial conference the parties shall:

1. Discuss any legal issues, including motions in limine, or other evidentiary issues which may arise during the course of trial.

2. Enter into stipulations of uncontested facts.

3. Submit a proposed preliminary jury instruction defining the nature of the alleged offense and the elements of that offense.

4. Disclose the identity of all expert witnesses and agree, if possible, upon the qualifications of expert witnesses.

5. Agree, if possible, upon the admissibility of exhibits. The parties shall mark their exhibits for identification prior to the final pretrial conference.

6. Advise the court of the number of witnesses expected to be called and estimated length of trial.

7. Submit proposed voir dire questions. During voir dire, the parties will not be permitted to repeat questions asked on the jury questionnaire or questions asked by the Court.

8. Review jury selection procedure.

9. Submit trial briefs and discuss legal issues which may arise at the trial.

10. Prior to the final pretrial conference, the parties shall meet and confer regarding jury instructions. At

the final pretrial conference, the parties must submit a joint set of jury instructions. The parties must identify the instructions upon which they agree and disagree. The parties must also submit a brief statement of the nature of any disputes relative to the jury instructions. This Court uses the 6th Circuit Pattern Criminal Jury Instructions (West Publishing).

11. If not previously made available to the other party, the government and defendant shall make available to each other at the final pretrial conference pursuant to Fed. R. Evid. 1006 all summaries which the party intends to introduce into evidence plus duplicates of the supporting documents which have been summarized.

*** This Court cannot allocate its resources efficiently if it must open court for a final pretrial conference. Therefore, if court is opened for a final pretrial conference, even if a defendant pleads guilty at the time set for the final pretrial conference, the defendant will not receive the one-level reduction in offense level described in U.S.S.G. § 3E1.1(b). In cases where a hearing for a plea of guilty is desired, counsel shall contact Melva Ludge, Case Manager, at 616.456.2327. The Court strongly encourages a consent to magistrate judge for the handling of a change of plea hearing.**

/s/ GORDON J. QUIST
Hon. Gordon J. Quist
U.S. District Judge

Dated: Nov. 2, 2005

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:05cr239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Nov. 2, 2005

ORDER

Defendant Jason Louis Tinklenberg, through counsel, has moved for a court order requiring him to submit to a psychiatric/psychological evaluation pursuant to 18 U.S.C. §§ 4241 and 4242 for the purpose of determining his competency to stand trial and his sanity at the time of the offense. The motion for such evaluation is not opposed by the government.

IT IS HEREBY ORDERED that Defendant Jason Louis Tinklenberg's Motion for Psychological Evaluation is **GRANTED** and Defendant is committed to the custody of the Attorney General for a period not to exceed 30 days for placement in an appropriate facility for psychological and psychiatric evaluation within the meaning of 18 U.S.C. §§ 4241 and 4242.

IT IS FURTHER ORDERED that the evaluation shall be performed by a licensed psychiatrist and psychologist, it shall include extensive objective testing, and it shall evaluate whether Defendant is competent to stand trial, whether Defendant was legally insane at the time of the offense, and whether Defendant's mental condition might be improved through mental health treatment, including prescription medication.

IT IS FURTHER ORDERED that the Attorney General shall file the report of the evaluation with the Clerk **under seal,** but shall also submit copies of the report to defense counsel for review.

IT IS FURTHER ORDERED that, upon return of the report, a competency/sanity hearing shall be promptly scheduled by the Court's case manager.

IT IS FURTHER ORDERED that the professional preparing the evaluation shall make him/herself available for testimony at the competency/sanity hearing.

/s/ ELLEN S. CARMODY
ELLEN S. CARMODY
United States Magistrate Judge

Date: Nov. 2, 2005

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:05cr239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Dec. 16, 2005

REQUEST FOR EXTENSION OF TIME TO COMPLETE PSYCHOLOGICAL AND COMPETENCY EVALUATION

The United States of America, by and through its attorneys, Margaret M. Chiara, United States Attorney for the Western District of Michigan, and Julie Ann Woods, Assistant United States Attorney, requests an extension of time for the psychological evaluation of the Defendant as requested by defense counsel and ordered by the court, pursuant to 18 U.S.C. §§ 4242, 4243, and 4246, for the following reasons:

1. Pursuant to the court's order of November 2, 2005, the Defendant was committed to the custody of the Attorney General for psychological and psychiatric evaluation for a period not to exceed 30 days.

2. Dr. Ronald Nieberding of the Bureau of Prisons, Metropolitan Correctional Center, (MCC), located in Chicago, Illinois contacted the United States Attorney's office for the Western District of Michigan on December 12, 2005, and informed the United States attorney's office that the Defendant was at the MCC for a psychological and competency evaluation.

3. Dr. Nieberding also informed the United States Attorney's Office that the Defendant was not cooperating in the effort to evaluate him.

4. Dr. Nieberding informed the United States Attorney's Office that the evaluation in question would not be complete before the scheduled Final Pre-Trial conference on December 27, 2005, nor would it be complete prior to the trial date of January 3, 2006.

Wherefore, the United States Attorney's Office requests and extension of time for the psychological and competency evaluation pursuant to 18 U.S.C. §§ 4247(b), 4242, 4243, and 4246.

Respectfully submitted,

MARGARET M. CHIARA
United States Attorney

/s/ JULIE ANN WOODS
JULIE ANN WOODS
Assistant United States Attorney

Dated: Dec. 16, 2005

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:05cr239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Dec. 20, 2005

PROPOSED ORDER

The United States have filed a Request for Extension of Time to Complete Psychological and Competency Evaluation, and by leave of this Court,

IT IS HEREBY ORDERED THAT THE Final Pre-Trial Conference and Trial will beheld in abeyance until the completion of the evaluation.

/s/ GORDON J. QUIST
HON. GORDON J. QUIST
United States District Court Judge
Western District of Michigan

Dated: Dec. 20, 2005

[SEAL OMITTED] U.S. Department of Justice
Federal Bureau of Prisons
Metropolitan Correctional Center

71 W. Van Buren Street
Chicago, IL 60605
Dec. 12, 2005

The Honorable Judge Ellen S. Carmody
United States District Court Chief Magistrate Judge
Western District of Michigan
402 Federal Building
110 Michigan Street NW
Grand Rapids, MI 49503

RE: TINKLINBERG, Jason
Docket No.: 1:05-cr-00239
Reg. No.: 12507-040

Dear Judge Carmody:

This is in response to your court order dated November 2, 2005, which committed Mr. Tinklinberg to an examination and evaluation pursuant to Title 18, United States Code, Sections 4241 and 4242. Mr. Tinklinberg was designated to the Metropolitan Correctional Center (MCC) Chicago, Illinois, on November 10, 2005, and arrived at the institution on November 30, 2005.

The statute allows our psychology staff 45 days to complete the testing and examination. Our clinical psychologist requests a 30-day extension as permitted by the statute in order to complete the testing and examination necessary to develop a history, diagnosis, and opinion

regarding both the 4241 and 4242 questions. The time period for the evaluation commenced upon arrival at MCC Chicago. It is anticipated that the evaluation will be completed by February 13, 2006. Three copies of the report will be submitted to the court within two weeks of completion of the evaluation. You can expect to receive the report by February 27, 2006, should you grant our request for extension.

If you should have any questions regarding this request, please contact Dr. John Pindelski at (312) 322-0567, Ext. 469. For any other questions, please contact me at (312) 322-0567, Ext. 500.

Sincerely,

/s/ DARLENE ALEXANDER
for SILAS M. IRVIN
Warden

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:05cr239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Dec. 28, 2005

ORDER

This matter is before the Court on the request of the Federal Bureau of Prisons for a 30-day extension of time to complete the psychological evaluation of defendant (Dkt. 18). The Court being fully advised in the premises finds the requested extension in the interest of justice.

IT IS HEREBY ORDERED that the Request for Extension of Time (Dkt. 18) is granted. The evaluation shall be completed by February 13, 2006.

/s/ ELLEN S. CARMODY
ELLEN S. CARMODY
United States Magistrate Judge

Date: Dec. 28, 2005

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:05cr239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Feb. 10, 2006

AMENDED SECOND REQUEST FOR EXTENSION OF TIME TO COMPLETE PSYCHOLOGICAL AND COMPETENCY EVALUATION

The United States of America, by and through its attorneys, Margaret M. Chiara, United States Attorney for the Western District of Michigan, and Julie Ann Woods, Assistant United States Attorney, requests an additional extension of time for the psychological evaluation of the Defendant as requested by defense counsel and ordered by the court, pursuant to 18 U.S.C. §§ 4242, 4243, and 4246, for the following reasons:

1. Pursuant to the court's order of November 2, 2005, the Defendant was committed to the custody of the Attorney General for psychological and psychiatric evaluation for a period not to exceed 30 days.

2. Dr. Ronald Nieberding of the Bureau of Prisons, Metropolitan Correctional Center, (MCC), located in Chicago, Illinois contacted the United States Attorney's office for the Western District of Michigan on December 12, 2005, and informed the United States attorney's office that the Defendant was at the MCC for a psychological and competency evaluation.

3. Dr. Nieberding also informed the United States Attorney's Office that the Defendant was not cooperating in the effort to evaluate him.

4. Dr. Nieberding informed the United States Attorney's Office that the evaluation in question would not be complete before the scheduled Final Pre-Trial conference on December 27, 2005, nor would it be complete prior to the trial date of January 3, 2006.

5. On December 28, 2005, the Court ordered that an extension of time to complete the psychological evaluation until February 13, 2006.

6. On February 10, 2006, Assistant United States Attorney, Julie Ann Woods, contacted Dr. John Pindelski at the Metropolitan Correctional Center in Chicago regarding the Defendant. Dr. Pindelski said that the Metropolitan Correctional Center needed an additional four weeks to complete its evaluation and write its report.

7. The government attempted to contact Defense counsel, Larry Phelan, to seek his concurrence in the request for an extension of time, but was unable to connect with him.

Wherefore, the United States Attorney's Office requests an extension of time until March 13, 2006, be

granted to facilitate the completion of the psychological evaluation of the Defendant.

Respectfully submitted,

MARGARET M. CHIARA
United States Attorney

/s/ JULIE ANN WOODS
JULIE ANN WOODS
Assistant United States Attorney

Dated: Feb. 10, 2006

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:05cr239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Feb. 17, 2006

ORDER

This matter is before the Court on the Government's Amended Second Request for Extension of Time to Complete Psychological and Competency Evaluation (Dkt. 20). The Court being fully advised in the premises, and the motion being unopposed by the defense:

IT IS HEREBY ORDERED that the Government's Amended Second Request for Extension of Time to Complete Psychological and Competency Evaluation (Dkt. 20) is **granted**, and the Metropolitan Correctional Center shall have until **March 13, 2006** to complete the evaluation of the defendant.

/s/ ELLEN S. CARMODY
ELLEN S. CARMODY
United States Magistrate Judge

Date: Feb. 17, 2006

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:05cr239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Mar. 23, 2006

ORDER

Consistent with the hearing findings of March 22, 2006:

IT IS HEREBY ORDERED that the Court finds Defendant Jason Louis Tinklenberg competent within the meaning of 18 U.S.C. § 4241(d) in that he is capable of understanding the nature and consequences of the proceedings against him and of assisting in his own defense. This order does not address defendant's mental state at the time of the offense.

/s/ ELLEN S. CARMODY
ELLEN S. CARMODY
United States Magistrate Judge

Date: Mar. 23, 2006

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

[Filed: Mar. 23, 2006]

PRETRIAL CONFERENCE SUMMARY ORDER

Following the initial pretrial conference conducted in this matter, it is hereby ordered:

1. DISCOVERY

A. Statements of Defendant

1. Oral Statements [Rule 16(a)(1)(A)]

[ ] There are no oral statements as defined in Rule 16(a)(1)(A).

[X] There are the following oral statements:

STATEMENTS WERE MADE TO KALAMAZOO CO. SHERIFF PERSONNEL ON 1/14/05 the substance of which has been disclosed to defense counsel.

All written or recorded statements have been disclosed or will be by _____.

2. Written or Recorded Statements [Rule 16(a)(1)(B)(i)-(iii)]

[X] There are no written or recorded statements or grand jury testimony of defendant.

[ ] There are the following written or recorded statements or grand jury testimony.

All written or recorded statements have been disclosed or will be by _____.

B. Defendant's Prior Record [Rule 16(a)(1)(D)

[ ] The government has made due inquiry and is not aware of any prior criminal record.

[X] The government has disclosed defendant's prior criminal history.

[ ] The government is now making inquiry into defendant's prior criminal history. The results will be disclosed to defense counsel upon receipt.

C. Documents and Tangible Objects [Rule 16(a)(1)(E)]

[ ] The government has no documents, tangible objects, or physical evidence required to be disclosed.

[X] The government has the following documents, tangible objects, and physical evidence:

[ ] Controlled substances_____ [X] Drug Paraphernalia

[ ] Records: _____ [ ] Drug Records

[ ] See Attached Inventory

[X] Other: THE TWO GUNS IN QUESTION, THE CHEMICALS AND PARAPHERNALIA TO PRODUCE METH

[X] They have been made available for inspection and copying by defense counsel.

[X] Defense counsel should make arrangements with SA KAREN RIVARD, ATF 616 301 6100 OR 269 337 8967

D. Reports of Examinations and Test [Rules 16(a)(1)(F)]

[ ] The government has no reports of examinations or tests required to be disclosed by Rule 16.

[X] The government has or expects to have reports of the following examinations and tests:

[X] Drug Analysis [ ] Handwriting [X] Fingerprints [X] Other: INTERSTATE NEXUS STATEMENT, OPERABILITY OF FIREARMS,

REPORT RE: CHEMICALS

E. Reciprocal Discovery

[X] The government seeks reciprocal discovery.

F. Other Discovery Matters:

_____

_____

G. Discovery Obligation. All parties shall comply with Rule 16. Federal Rules of Criminal Procedure, including the requirement pertaining to expert witnesses. If any party discovers additional information required to be disclosed under Rule 16, it is to advise opposing counsel in writing regarding that information. The parties must also be prepared to comply with the provisions of Rule 26.2 at trial.

H. Notice Under FRE 404(b)

[✓] The defendant requests disclosure pursuant to FRE 404(b)

[✓] The government *does not* presently intend to introduce 404(b) evidence.

[ ] The government will provide pretrial notice of 404(b) evidence by _____.

II. MOTIONS [RULE 12]

A. The following defense motions are filed or contemplated:

Unknown

B. Defendant must file all Rule 12(b) motions no later than *3* weeks from today's date, unless by leave of court.

III. TRIAL

A. This is a __X__ jury ____ non-jury trial.

B. Length of trial excluding jury selection is estimated at TWO DAYS.

IV. MISCELLANEOUS

A. Defense counsel shall explain to the defendant the plea negotiation process, including the effect of any limitation by the U.S. Attorney on the time to accept plea offers.

B. Other:

Dated: 3/23/06 /s/ ELLEN S. CARMODY
United States Magistrate Judge

Approved in form and substance:

/s/ JULIE ANN WOODS
For the United States

/s/ ILLEGIBLE
Attorney for the Defendant

/s/ JASON TINKLENBERG
Defendant

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Mar. 27, 2006

ORDER SETTING FINAL PRETRIAL AND TRIAL

(* Note recent changes to this Order of Scheduling)

IT IS ORDERED that jury selection and trial shall commence on **May 30, 2006 at 8:30 a.m.**, in the United States District Court, Courtroom 499, Federal Building, 110 Michigan, N.W., Grand Rapids, Michigan. Counsel and the parties shall be present in the courtroom at 8:30 a.m., to address preliminary matters.

IT IS ORDERED that a final pre-trial conference be held on **May 15, 2006 at 3:00 p.m.**, in the United States District Court, Courtroom 499, Federal Building, 110 Michigan, N.W., Grand Rapids. Michigan. Counsel who will try this case shall appear at the final pretrial conference. The attendance of the defendant is required unless specifically waived.

All pending motions shall be heard at the time of the final pretrial conference on May 15, 2006, unless otherwise notified by the Court.

IT IS FURTHER ORDERED that at the final pretrial conference the parties shall:

1. Discuss any legal issues, including motions in limine, or other evidentiary issues which may arise during the course of trial.

2. Enter into stipulations of uncontested facts.

3. Submit a proposed preliminary jury instruction defining the nature of the alleged offense and the elements of that offense.

4. Disclose the identity of all expert witnesses and agree, if possible, upon the qualifications of expert witnesses.

5. Agree, if possible, upon the admissibility of exhibits. The parties shall mark their exhibits for identification prior to the final pretrial conference.

6. Advise the court of the number of witnesses expected to be called and estimated length of trial.

7. Submit proposed voir dire questions. During voir dire, the parties will not be permitted to repeat questions asked on the jury questionnaire or questions asked by the Court.

8. Review jury selection procedure.

9. Submit trial briefs and discuss legal issues which may arise at the trial.

10. Prior to the final pretrial conference, the parties shall meet and confer regarding jury instructions. At the final pretrial conference, the parties must submit a

joint set of jury instructions. The parties must identify the instructions upon which they agree and disagree. The parties must also submit a brief statement of the nature of any disputes relative to the jury instructions. This Court uses the 6th Circuit Pattern Criminal Jury Instructions (West Publishing).

11. If not previously made available to the other party, the government and defendant shall make available to each other at the final pretrial conference pursuant to Fed. R. Evid. 1006 all summaries which the party intends to introduce into evidence plus duplicates of the supporting documents which have been summarized.

***This Court cannot allocate its resources efficiently if it must open court for a final pretrial conference. Therefore, if court is opened for a final pretrial conference, even if a defendant pleads guilty at the time set for the final pretrial conference, the defendant will not receive the one-level reduction in offense level described in U.S.S.G § 3E1.1(b). In cases where a hearing for a plea of guilty is desired, counsel shall contact Melva Ludge, Case Manager, at 616.456.2327. The Court strongly encourages a consent to magistrate judge for the handling of a change of plea hearing.**

/s/ GORDON J. QUIST
HON. GORDON J. QUIST
U.S. District Judge

Dated: Mar. 27, 2006

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Apr. 17, 2006

ORDER FOR INDEPENDENT FORENSIC COMPETENCY AND MENTAL EVALUATION

This matter is before the Court on the Defendant's Petition for an Independent Forensic Competency and Mental Evaluation. The Court finding good cause for the request:

THE COURT HEREBY ORDERS an impartial examination to determine competency to stand trial and sanity at the time of the offense pursuant to 18 U.S.C. §§ 4241 and 4242, and grants Defendant's motion.

The Court hereby appoints Jeffrey T. Kieliszewski, Ph.D., a licensed forensic psychologist in the state of Michigan, to conduct an examination of Defendant and to report to the Court on the issues of Defendant's competency to stand trial and his sanity at the time of the offense. 18 U.S.C. §§ 4241 and 4242. Dr. Kieliszewski's address at Human Resource Associates is 161 Ottawa

Ave., Ste 300-C, Grand Rapids, MI 49503, (616) 458-0692. On the basis of the court's familiarity with reasonable hourly rates charged for like services in this area, the hourly rate for out-of-court time is established at $150.00 per hour. In-court time shall be compensated at the same rate. Out-of-court time expended in reviewing records, administering tests, examining Defendant, and preparing a report shall not exceed fifteen (15) hours without previous leave of the Court.

The Department of Justice shall be chargeable for the expenses of Dr. Kieliszewski's examination on the issue of competency (Guide for U.S. District Judges, Volume 7, Sec. A, Chapter 3, § 3.11).

Dr. Kieliszewski shall be allowed to examine Defendant in the Newaygo County Jail, on a date to be prearranged with the Newaygo County Jail and the Marshal's Service.

Dr. Kieliszewski's report shall conform to the requirements of 18 U.S.C. § 4247(c) and shall be submitted no later than **May 15, 2006**, unless this time is extended by the Court. The report shall be filed with the Clerk of the Court under seal. After the report has been filed, the Court will conduct a competency hearing pursuant to 18 U.S.C. §§ 4241(d) and 4242.

IT IS FURTHER ORDERED that the period of time until Defendant's competency is determined shall be excluded time for the purposes of the Speedy Trial Act, 18 U.S.C. § 3161(h)(l)(A).

/s/ ELLEN S. CARMODY
ELLEN S. CARMODY
United States Magistrate Judge

Date: Apr. 17, 2006

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239
UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: May 31, 2006

AMENDED NOTICE

Type of Case:

___ CIVIL ___X___ CRIMINAL

__ X __ TAKE NOTICE that a proceeding in this case has been set for the place, date and time set forth below:

PLACE	ROOM NO.
	Courtroom 401
Federal Building 110 Michigan, NW Grand Rapids, MI	DATE AND TIME **WEDNESDAY, JUNE 7, 2006 at 3:30 p.m.**

TYPE OF PROCEEDING

Hearing on:

1. **Defendant's Pro Se Motion for New Counsel (Dkt. 37); and**

2. **Defendant's Counsel's Motion to Withdraw (Dkt. 38)**

__X__ TAKE NOTICE that the proceeding in this case has been continued as indicated below:

PLACE	DATE AND TIME PREVIOUSLY SCHEDULED	CONTINUED TO, DATE AND TIME
Courtroom 401 Federal Building 110 Michigan, NW Grand Rapids, MI	6/5/06, 2:00 p.m.	6/7/06, 3:30 p.m.

ELLEN S. CARMODY
United States Magistrate Judge

DATE: May 31, 2006

/s/ CYNTHIA BLACK HOSNER
(BY) CYNTHIA BLACK HOSNER,
DEPUTY CLERK

TO: Counsel of Record
U.S. Marshal
Probation
(By CBH 5/31/06)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: June 13, 2006

ORDER SETTING FINAL PRETRIAL AND TRIAL

(*Note recent changes to this Order of Scheduling)

IT IS ORDERED that jury selection and trial shall commence on **August 15, 2006 at 8:30 a.m., in the United States District Court, Courtroom 499, Federal Building, 110 Michigan, N.W., Grand Rapids, Michigan.** Counsel and the parties shall be present in the courtroom at 8:30 a.m., to address preliminary matters.

IT IS ORDERED that a final pre-trial conference be held on **August 8, 2006 at 2:30 p.m., in the United States District Court, Courtroom 499, Federal Building, 110 Michigan, N.W., Grand Rapids, Michigan.** Counsel who will try this case shall appear at the final pretrial conference. The attendance of the defendant is required unless specifically waived.

All pending motions shall be heard at the time of the final pretrial conference on August 8, 2006, unless otherwise notified by the Court.

IT IS FURTHER ORDERED that at the final pretrial conference the parties shall:

1. Discuss any legal issues, including motions in limine, or other evidentiary issues which may arise during the course of trial.

2. Enter into stipulations of uncontested facts.

3. Submit a proposed preliminary jury instruction defining the nature of the alleged offense and the elements of that offense.

4. Disclose the identity of all expert witnesses and agree, if possible, upon the qualifications of expert witnesses.

5. Agree, if possible, upon the admissibility of exhibits. The parties shall mark their exhibits for identification prior to the final pretrial conference.

6. Advise the court of the number of witnesses expected to be called and estimated length of trial.

7. Submit proposed voir dire questions. During voir dire, the parties will not be permitted to repeat questions asked on the jury questionnaire or questions asked by the Court.

8. Review jury selection procedure.

9. Submit trial briefs and discuss legal issues which may arise at the trial.

10. Prior to the final pretrial conference, the parties shall meet and confer regarding jury instructions. At the final pretrial conference, the parties must submit a

joint set of jury instructions. The parties must identify the instructions upon which they agree and disagree. The parties must also submit a brief statement of the nature of any disputes relative to the jury instructions. This Court uses the 6th Circuit Pattern Criminal Jury Instructions (West Publishing).

11. If not previously made available to the other party, the government and defendant shall make available to each other at the final pretrial conference pursuant to Fed. R. Evid. 1006 all summaries which the party intends to introduce into evidence plus duplicates of the supporting documents which have been summarized

*** This Court cannot allocate its resources efficiently if it must open court for a final pretrial conference. Therefore, if court is opened for a final pretrial conference, even if a defendant pleads guilty at the time set for the final pretrial conference, the defendant will not receive the one-level reduction in offense level described in U.S.S.G § 3E1.1(b). In cases where a hearing for a plea of guilty is desired, counsel shall contact Melva Ludge, Case Manager, at 616.456.2327. The Court strongly encourages a consent to magistrate judge for the handling of a change of plea hearing.**

/s/ GORDON J. QUIST
HON. GORDON J. QUIST
U.S. District Judge

Dated: June 13, 2006

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: July 25, 2006

CRIMINAL CASE MANAGEMENT ORDER

IT IS HEREBY ORDERED:

1. TRIAL DATE AND SETTING: The jury trial in this matter shall commence on **August 14, 2006**, at the United States District Court, 410 West Michigan Avenue, Kalamazoo, Michigan. **Counsel for the United States and the defendants, as well as the defendants are required to be present at 8:30 a.m.** Unless notified to the contrary, the jury portion of the trial will be conducted each trial day from 8:30 a.m. to 1:00 p.m., Monday through Friday.

2. FINAL PRETRIAL CONFERENCE DATE: A final pretrial conference shall be held on **August 7, 2006 at 2:30 p.m.**, at the United States District Court 410 West Michigan Avenue, Kalamazoo, Michigan. Counsel who will try the case shall appear at the final pretrial conference. The attendance of the defendants is required unless specifically waived by the Court. Any re-

quest for a waiver of the defendant's appearance must be made by counsel in writing and accompanied by a waiver executed by the defendant not less than seven (7) days prior to the conference.

3. MOTIONS: All motions in limine, shall be filed on or before **July 31, 2006.**

4. PRE-CONFERENCE FILINGS: No later than **August 2, 2006,** counsel shall file:

(A) Trial briefs and proposed voir dire questions.

(B) A joint set of proposed jury instructions, including a proposed preliminary jury instruction defining the nature of the alleged offense and the elements of that offense. The parties are strongly encouraged to submit a copy of the proposed jury instructions on a computer diskette, compatible with IBM computer/ Corel WP 6.1 and higher.

The parties must identify the instructions upon which they agree and disagree. The parties must also submit a brief statement of the nature of any dispute relative to the jury instructions.

This Court uses the *6th Circuit Pattern Criminal Jury Instructions* (West Publishing).

5. TRIAL PRACTICE: No proceedings will take place that reduce the jury's trial time. The Court will not hold bench or chambers conferences during the trial. Trial testimony will be presented without interruption for four and one-half hours each day. All legal issues must be raised in advance of trial by written noticed motions. All matters which are of critical importance, even evidentiary ones, must be filed on or before the

motion cut-off date. They will not be considered during the trial without strong showing that counsel could not by the exercise of due diligence have raised them sooner.

Immediately after opening statements, the government shall furnish exhibit books to the Court, each juror and the court clerk. Defense exhibits shall be provided at the beginning of the defense case. Counsel shall premark all exhibits, the government using a numbering system (1, 2, 3), defendants using a lettering system (a, b, c). In addition, all exhibits shall be premarked with the case number. If an attorney does not wish to show an exhibit to the opposing party, she need not do so, but the requirement to premark it remains. Each party shall identify its exhibits on a form similar to Exhibit 1 attached to this Order. (This form can be produced by WordPerfect 6.1 Tables.)

Should an objection arise during trial, counsel shall defer questioning the witness on the objectionable area. The parties shall brief the issue and the Court will rule at a more convenient time, when it will not impose upon the jury's time.

If during the trial the attorneys wish to take a matter up with the Court, they are directed to let the clerk know either by sign or by note. At the next recess or at the end of the day, the Court will hear counsel.

To allow sufficient opportunity for counsel to anticipate legal issues, the names of all witnesses and exhibits expected to be used shall be disclosed to opposing counsel forty-eight hours in advance.

Counsel should not paraphrase each answer of a witness into a new question which asks the same thing.

There is no need to hear the testimony of the witnesses two or three times.

In advance of trial, or at least before a witness testifies, counsel shall notify the clerk what exhibits the witness will be asked to testify about. These exhibits can then be placed before the witness at the beginning, each clearly labeled. If cross-examining counsel intends to examine the witness on other exhibits, those exhibits shall be identified to the clerk and placed before the witness at the beginning of cross-examination.

Witnesses shall not draw diagrams or put markings on exhibits while the jury is in the box. This should be done before the witness gets to the stand. The witness may then adopt the diagrams and markings and tell the jury what they represent. Enough witnesses should be present to ensure a full day of testimony. There should be no "dead time" caused by running out of witnesses.

IT IS FURTHER ORDERED: that at the final pretrial conference the parties shall:

1) Discuss the status of any plea negotiations.

2) Enter into stipulations of uncontested facts.

3) Discuss any legal issues including motions in limine or other evidentiary issues which may arise during the course of the trial.

4) Disclose the identity of all expert witnesses and agree, if possible, upon the qualifications of expert witnesses.

5) Advise the Court of the number of witnesses expected to be called at trial.

6) Agree upon the admissibility of exhibits. The parties shall mark the exhibits for identification prior to the final pretrial conference.

7) Any party intending to introduce into evidence summaries pursuant to Fed. R. Evid. 1006 must make available at or before the final pretrial conference copies of all such summaries and duplicates of the supporting documents summarized.

8) Estimate the time required for trial.

9) Discuss trial practice and procedures.

/s/ RICHARD ALAN ENSLEN
RICHARD ALAN ENSLEN
Senior United States District Judge

Dated in Kalamazoo, MI:
July 25,2006

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Aug. 1, 2006

GOVERNMENT'S MOTION FOR A VIDEO DEPOSITION

The United States, through its attorneys, Margaret M. Chiara, United States Attorney for the Western District of Michigan and Julie Ann Woods, Assistant United States Attorney request permission to hold a video deposition of Joshua Howk from the Kalamazoo County Public Safety Department pursuant to Fed. Rule Crim P. 15(a) for the following reasons:

1. Officer Joshua Howk, for several months, has had a trip outside of the United States scheduled. He is to fly out of the country on August 13, 2006.
2. Officer Joshua Howk will lose several thousand dollars if he cancels said trip.
3. Officer Joshua Howk found the firearm and ammunition seized during the search of Defendant's vehicle on January 14, 2005.

4. Officer Joshua Howk is an essential witness in the case.

5. The government was unable to reach defense counsel to discuss this request.

WHEREFORE, the United States requests permission to schedule a video deposition of Officer Joshua Howk prior to his departure from the United States on 8/13/06.

Respectfully submitted,

MARGARET M. CHIARA
United States Attorney

Dated: Aug 1, 2006

/s/ JULIE ANN WOODS
JULIE ANN WOODS
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Aug. 2, 2006

ORDER TO RESPOND

This matter is before the Court on Plaintiff United States of America's Motion for a Video Deposition. The Court observes that Defendant Jason Louis Tinklenberg has neither responded to, nor concurred with, the relief sought in Plaintiff's Motion. The Court further observes that considering the nature of the relief sought, time is of the essence.

THEREFORE, IT IS HEREBY ORDERED that Defendant Jason Louis Tinklenberg **SHALL RESPOND** to Plaintiff United States of America's Motion for a Video Deposition (Dkt. No. 60) as soon as possible, but **NOT LATER THAN AUGUST 9, 2006**.

/s/ RICHARD ALAN ENSLEN
Richard Alan Enslen
SENIOR UNITED STATES
DISTRICT JUDGE

DATED in Kalamazoo, MI:
Aug. 2, 2006

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Aug. 2, 2006

ANSWER TO GOVERNMENT'S MOTION FOR A VIDEO DEPOSITION

NOW COMES the defendant by his attorney Richard D. Stroba of the Federal Public Defender Office and for his answer states:

1. That defendant's counsel was informed as to the issue involving witness Howk by a voice-mail message which was left (and/or received) on July 26, 2006.

2. That counsel for the defendant met with the defendant at the Newaygo County Jail in White Cloud, Michigan on the first opportunity to do so, which was Tuesday, August 1, 2006, to advise the client as to the matter and the request of the government to be made to the Court regarding the deposition.

3. That having counseled and consulted with the client, counsel for the defendant expresses no position on the request for the video deposition of the named witness and leaves the matter to the sound discretion of the Court.

4. That the defendant does not take issue with, or contest, the factual averments made by the government in support of its motion.

5. That the defendant does not believe that the trial should be delayed due to lack of a witness the government deems as "essential." (The defendant notes that the original trial date of August 15, 2006 was scheduled by the Court on June 13, 2006.)

WHEREFORE, defendant prays that this Honorable Court exercise its sound discretion in this matter, and that if the request to depose the witness is granted, that the provisions of Fed. R. Crim. P. 15(c)(1) be ordered to be followed as set forth therein.

Respectfully submitted,

RAY KENT
Federal Public Defender

/s/ RICHARD D. STROBA

Assistant Federal Public Defender
50 Louis , N.W. - Suite 500
Grand Rapids, MI 49503-2633
616-742-7420

Dated: Aug. 2, 2006

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Aug. 3, 2006

ORDER

This matter is before the Court on Plaintiff United States of America's Motion for a Video Deposition. Defendant Jason Louis Tinklenberg does not object to Plaintiff s request and the Court believes exceptional circumstances are present in this case such that the taking of deposition testimony serves the interests of justice. FED. R. CRIM. P. 15(a).

THEREFORE, IT IS HEREBY ORDERED that Plaintiff United States of America's Motion for a Video Deposition (Dkt. No. 60) is **GRANTED**. The parties shall schedule said deposition posthaste so as not to delay trial.

Dated in Kalamazoo, MI:
Aug. 3, 2006

/s/ RICHARD ALAN ENSLEN
RICHARD ALAN ENSLEN
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Aug. 7, 2006

REQUEST TO PERMIT FIREARM TO ENTER THE COURTHOUSE AND TO BE STORED OVERNIGHT PENDING CONCLUSION OF TRIAL

Now comes the United States of America, through its attorneys, Margaret M. Chiara, United States Attorney for the Western District of Michigan, and Julie Ann Woods, Assistant United States Attorney, and states as follows:

1. The above captioned case is currently scheduled for trial before this Court on August 14, 2006, and the government anticipates putting into evidence firearms, to wit:

- a Phoenix Arms .22 caliber pistol, Model number HP22, serial number 4039605
- a Savage Arms, Springfield Model 67F, twenty gauge, pump action shotgun, with no visible serial number

2. Administrative Order Number 96-012 requires the government to obtain a court order to permit firearms into the courthouse during trial and to be stored by the United States Marshal's Service until conclusion of the trial.

3. The government anticipates admitting into evidence the firearms referenced in paragraph 1 as an exhibit on or about August 14, 2006.

4. The referenced firearm is currently in the possession of the agents of the Bureau of Alcohol, Tobacco and Firearms.

Wherefore the government requests this Honorable Court to grant an order admitting the firearms into the courthouse by Special Agents of the Bureau of Alcohol, Tobacco and Firearms until conclusion of this trial.

MARGARET M. CHIARA
United States Attorney

Dated: Aug. 7, 2006

/s/ JULIE ANN WOODS
JULIE ANN WOODS
Assistant United States Attorney
P.O. Box 208
Grand Rapids, Michigan 49501-0208
(616) 456-2404

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Aug. 10, 2006

ORDER PERMITTING FIREARM TO ENTER THE COURTHOUSE AND BE STORED

Upon motion of the government,

IT IS SO ORDERED that agents of the Bureau of Alcohol, Tobacco and Firearms are permitted to enter the courthouse and store the firearm in this case until conclusion of this trial.

Dated: Aug. 10, 2006

/s/ RICHARD ALAN ENSLEN
RICHARD ALAN ENSLEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Aug. 7, 2006

DEFENDANT'S MOTION TO DISMISS BASED ON VIOLATION OF THE SPEEDY TRIAL ACT AND BRIEF IN SUPPORT THEREOF

Now comes the defendant, Jason Louis Tinklenberg, by and through his attorney, Richard D. Stroba, Assistant Federal Public Defender, and hereby moves this Honorable Court to dismiss the instant case because of a violation of the Speedy Trial Act pursuant to 18 U.S.C. §§ 3161 and 3162.

Facts:

The defendant is charged with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 924(g)(1) and 924(a)(2). He is also accused of being in possession of meth lab components in violation of 21 U.S.C. §§ 843(a)(6), 843(d), and 843(d)(2). Mr. Tinklenberg made his initial appearance in this matter on October 31,

2005. Since that time, a number of events and proceedings have taken place, including the following:[1]

10-31-05 **Initial Appearance** - Defendant appeared on the Indictment (issued 10/20/05); court appointed counsel was authorized. (Docket entry #10)

11-2-05 **Arraignment** - scheduled for this date (but hearing not held due to request for Forensic Psychiatric Examination), Forensic Psychiatric Examination ordered. (Docket entry #12)

11-10-05 Defendant designated by B.O.P. to MCC-Chicago for examination. (Letter of 3-16-06). (Attachment 2).

11-30-05 Defendant arrives at MCC Chicago for examination. (Letter of 3-16-05 - Attachment 2).

12-28-05 Order granting 30-day extension for completion of defendant's psychological exam. (Docket entry # 19)

2-17-06 Order granting extension for completion of defendant's psychological examination. (Docket entry #21)

3-20-06 Psychological Evaluation report received. (Docket entry #25)

3-22-06 **Competency hearing** - finding that defendant was competent held. (Docket entry #27)

3-23-06 **Arraignment** - (not guilty plea entered) initial pretrial conference and detention hearing held. (Docket entry #29)

3-29-06 Ex Parte Petition for an independent forensic psychiatric exam for competency filed. (Docket entry #34)

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[1] The dates and entries are taken from the Court's docket sheet. (See Attachment 1, Docket Sheet).

4-17-06 Order for Psychiatric Evaluation entered. (Docket entry #36)

4-26-06 Pro Se Motion to Appoint Counsel filed by defendant. (Docket entry #37)

5-9-06 Motion to Withdraw as Counsel filed by defendant's attorney. (Docket entry #38)

6-7-06 **Hearing** - held on Motion to Withdraw and Pro Se Motion - Motion granted, alternative counsel to be appointed. (Docket entry #43)

6-15-06 New counsel files appearance. (Docket entry #48)

Law and Argument:

Generally speaking, "speedy trial" refers to the speed in which the government must bring a defendant to trial. A defendant has both a constitutional right and a statutory right to a speedy trial. The Sixth Amendment of the United States Constitution states in part that "the accused shall enjoy the right to a speedy and public trial . . . " U.S. Const. Amendment VI. The Federal Speedy Trial Act attempts to quantify the time in which a defendant maybe brought to trial. 18 U.S.C. §§ 3161-3174. In the instant case, Jason Louis Tinklenberg brings his challenge under the Federal Speedy Trial Act.

I. **Statutory Challenge**

In passing the Speedy Trial Act, Congress intended to create more clarity by settings specific time periods. *United States v. Horton*, 705 F.2d 1414 (5th Cir.), cert. denied, 464 U.S. 997 (1983). A violation of the Speedy Trial Act mandates the dismissal of the indictment or information, with or without prejudice. *See* 18 U.S.C. § 3162(1)(2).

The Speedy Trial Act provision implicated is 18 U.S.C. § 3161(c)(1) which reads as follows:

> (c)(1) In any case in which a plea of **not guilty is entered**, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence **within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such a charge is pending, whichever date last occurs.** If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent. (emphasis added).

In the instant case, the first issue that arises is whether § 3161(c)(1) applies. The plain language of the statute states that this section applies "[I]n any case which a plea of not guilty is entered." The plain meaning of the language of the Speedy Trial Act requires a not guilty plea to begin the clockrunning. *United States v. O'Dell*, 154 F.3d 358, 360 (6th Cir. 1998). Mr. Tinklenberg was arraigned on March 23, 2005 and a "not guilty" plea was entered. The statute is clear that if a not guilty plea is entered, the trial must commence within seventy days from either: (1) the filing date of the indictment or information; or (2) the date the defendant appeared before a judicial officer of the court. § 3161(c)(1). The court begins counting the seventy days from whichever date occurs last. Since the defendant first appeared before the judicial officer on an indictment, the speedy trial clock is triggered in the instant case by the date of the initial appearance of the defendant. In this case, the initial appearance was on 10-31-2005. The speedy trial

clock, therefore, began that day. Since October 31, 2005, 287 days will have elapsed as of August 14, 2006. On its face, the Speedy Trial Act has been violated.

Calculation of Speedy Trial Act Time

Title 18 U.S.C. § 3161(h) sets forth numerous "periods of delay" that shall be excluded in computing the time within which the trial of any such offense must commence. The counting methods of Fed. R. Crim. P. 45(a) are used in calculating speedy trial. *United States v. Edgecomb*, 910 F.2d 1309,1315 (6th Cir. 1990). That rule reads as follows:

> (a) **Computation**. In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of some paper in court, a day on which weather or other conditions have made the office of the clerk of the district inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When a period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in these rules "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the

United States, or by the state in which the district court is held.

Discussed below are the time periods that the defendant posits are excludable under the provisions of the Speedy Trial Act. In all, a total of, at least 74 days are not excludable under the Speedy Trial Act and, therefore, even crediting all excludable time, a violation of the Speedy Trial Act has still occurred in this case.

Section 3161(h)(1)(A) excludes "delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of a defendant." *See, United States v. Miranda*, 986 F.2d 1283, 1284-85 (9th Cir. 1993) (affirming finding of 106 days of excludable delay under 3161(h)(1)(A) notwithstanding 45-day limit on competency examinations under 18 U.S.C. § 4247(b); *see also* 3161(h)(4) (excluding "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial."). In the instant case, the defendant was ordered to undergo a psychological evaluation, Under § 3161(h)(1)(A), this time is excludable with some exceptions.

The defendant's initial appearance before Magistrate Carmody was October 31, 2005. Counsel was appointed and the next date set was November 2, 2005. October 31, 2005 is not counted but November 1, 2005 is. This is one day.

On November 2, 2005, a motion (oral it is believed) was made to refer the defendant for a forensic psychiatric evaluation. An order for the examination was entered. The defendant was designated for examination at

MCC—Chicago on November 10, 2005. He arrived at the facility on November 30, 2005.

The forensic psychiatric report was received by the Court on March 20, 2006, although it was mailed on March 16, 2006. The defendant next appeared before Magistrate Carmody March 22, 2006 and was found competent to stand trial. By at least March 22, 2006, the clock resumed ticking. The defendant appeared before Magistrate Carmody March 23, 2006 for arraignment and an initial pretrial conference. His plea of not guilty was entered on the record.

The next event of importance occurred March 29, 2006, with the filing of defendant's Ex Parte Motion for an independent forensic psychiatric examination of the defendant. (It appears that this motion was not in accord with the defendant's wishes in the case.) This filing probably tolled the time under the Speedy Trial Act despite the defendant's disagreement with same. From March 22, 2006, to March 29, 2006, 6 days elapsed (excluding, the 22nd and the 29th conservatively). (If the Court uses March 20, 2006, the day the report was received, this total would be 8 days "on the clock.")

The next date of significance is June 7, 2006. On that date, the independent forensic psychiatric evaluation report was received (and placed under seal). The dual motions to change counsel were heard and granted. The order granting the motion to withdraw was entered June 9, 2006. The Federal Public Defender was then appointed to the case.

From June 8, 2006, to August 14, 2006, 67 days will have elapsed. Therefore, as of August 14, 2006, a total of 74 days not excludable under the Speedy Trial Act

will have elapsed in this case. (Perhaps the total is as many as 76 days depending on the use of March 20,2006 instead of March 22, 2006 as the operative date.)

Based on only the foregoing, 74 days (or 76 days) are not excludable under the provisions of the Speedy Trial Act. Therefore, the instant case must be dismissed pursuant to 18 U.S.C. 3162(a)(2).

II. Additional Delay That Should Be Counted

It should be noted that there is additional time that should be counted toward the speedy trial "clock." This time is discussed here. Section 3161(h)(1)(A) excludes "delay resulting from any proceeding, including any examinations, to determine the mental competency of physical capacity of a defendant." *See United States* v. *Miranda*, 986 F.2d 1283,1284-85 (9th Cir. 1993) (affirming finding of 106 days of excludable delay under 3161 (h)(l)(A) notwithstanding a 45-day limit on competency examinations under 18 U.S.C. § 4247(b); *see also* 3161(h)(4) (excluding "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.")

Section 3161 (h)(1)(H) presumptively limits excludable "delay resulting from transportation of any defendant . . . to and from places of examination or hospitalization" to 10 days. *See United States* v. *Castle*, 906 F.2d 134, 137-38 (5th Cir. 1990) (only 10 of 22 days between order for psychiatric examination and defendant's arrival at FCI Springfield excludable even though U.S. Marshal's Service did not act in bad faith but was merely negligent); *United States v. Jervey*, 630 F. Supp. 695, 697 (S.D.N.Y. 1986) ("[O]rdinary institutionalized delay

is not an excuse. When this Act was passed, Congress knew all about the customs and practices of the prison bus.")

In the instant case, Mr. Tinklenberg had to be transported by the U.S. Marshal's Service to Chicago for the psychiatric examination. The period of time for the defendant to be transported is limited to 10 excludable days. Here, the defendant was designated on November 10, 2005. He did not arrive until November 30, 2005. Therefore, 10 days of the transportation time is excludable and 10 days are not, in accordance with § 3161(h)(l)(H). (If the Court counts the time from the date of the Court's order for examination—11-2-05—then an additional 10 days would be added on.)

When this additional non-excludable time is added to the calculation, there are a total of at least 84 days (and possibly even 86 days) that are not excludable under the Speedy Trial Act. In light of this additional time that should be counted, it is even more clear that the Act has been substantially violated. Dismissal is mandated by the statute.

III. Dismissed With or Without Prejudice

A violation of the Speedy Trial Act mandates the dismissal of the indictment, with or without prejudice. *See* 18 U.S. C. § 3162(a)(2). In deciding whether to dismiss with or without prejudice, the district court must consider the general factors listed in 3162(a)(2)—as well as prejudice to the defendant—and neither has priority. *See United States* v. *Taylor,* 487 U.S. 326 (1988); *see, also United States* v. *Barnes,* 159 F.3d 4, 16-18 (1st Cir 1998); *United States* v. *Blevins,* 142 F.3d 223, 225-26

(5th Cir. 1998); *United States* v. *Pierce*, 17 F.3d 146, 148-49 (6th Cir. 1994); *United States* v. *Kottmyer*, 961 F.2d 569, 472-73 (6th Cir. 1992).

The Speedy Trial Act states that the court should consider these factors "among others." The listed factors include: (1) "the seriousness of the offense;" (2) the facts and circumstances of the case which led to the dismissal; and (3) the impact of a re-prosecution on the administration of this chapter and on the administration of justice. 18 U.S.C. § 3162(a)(2).

In the instant case, the defendant concedes that under the first factor, "the seriousness of the offense" the government can make a claim that a felon in possession of a firearm is a serious matter. However, the underlying facts of the instant case would demonstrate that the instant offense case arose after Mr. Tinklenberg is said to have allegedly admitted to police officers that he had a firearm in his vehicle as they were speaking with him regarding an ongoing traffic stop. This is not a case where Mr. Tinklenberg was making threats or otherwise using the firearm. The drug-related charges refer to possession of meth lab components. The defendant possessed several legal items that are inferred to be drug lab components. Again, this is an arguably serious charge, but it is something which could be prosecuted in state court should re-prosecution be considered by the government even if the federal case is hereby dismissed with prejudice.

As to the impact that a re-prosecution would have on the administration of justice, the defendant would argue that such prosecution would be a miscarriage of justice. Although determined to be competent, the defendant,

nonetheless, has serious mental health and drug abuse issues. These have not resolved over the nine months the case has been pending. This entire process has only added to the pressures and stress that he must deal with on a daily basis. The defendant has had actions taken during the pendency of the proceedings that he believes have been against his interest, including the request for an independent forensic psychiatric examination. The defendant believes that the lengthy delay has been contrary to his due process rights.

Mr. Tinklenberg has been in custody over nine months on these charges at this time.

Therefore, the case should be dismissed with prejudice at this juncture.

Respectfully submitted,

RAY KENT
Federal Public Defender

/s/ RICHARD D. STROBA

Assistant Federal Public Defender
50 Louis, N.W. - Suite 500
Grand Rapids, MI 49503-2633
616-742-7420

Dated: Aug. 11, 2006

Attachment 1:
Court's Docket Sheet

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
(SOUTHERN DIVISION)

No. 1:05-CR-00239-RAE-ALL

UNITED STATES OF AMERICA

v.

JASON LOUIS TINKLENBERG

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/20/05	1	INDICTMENT as to Jason Louis Tinklenberg (ele,) (Entered: 10/21/2005)
10/26/05	3	NOTICE *of Errata* by USA as to Jason Louis Ticklenberg re Indictment 1 (Woods, Julie) (Entered: 10/26/2005)
10/26/05		MOTION to amend/correct 1 Indictment *to correct spelling of defendant's name, as taken from document 3 Notice of Errata* by USA as to Jason Louis Tinklenberg (skr,) (Entered: 10/28/2005)
10/27/05	4	PROPOSED ORDER re 3 *Notice of Errata* by USA as to Jason

DATE	DOCKET NUMBER	PROCEEDINGS
		Louis Ticklenberg (Woods, Julie) (Entered: 10/27/2005)
10/27/05	5	PROPOSED ORDER re 3 *Notice of Errata Amended* by USA as to Jason Louis Ticklenberg (Woods, Julie) (Entered: 10/27/2005)
10/28/05	6	ORDER striking proposed order 4 as to Jason Louis Tinklenberg (1); granting proposed order 5 as to Jason Louis Tinklenberg (1); granting motion to amend/ correct Indictment 1 (named as Notice of Errata 3), as to Jason Louis Tinklenberg (1); signed by Judge Gordon J. Quist (Judge Gordon J. Quist, mil) Modified text on 10/31/2005 (skr) (Entered: 10/28/2005)
10/31/05	7	ORDER OF TEMPORARY DETENTION pursuant to the Bail Reform Act as to defendant Jason Louis Tinklenberg: detention hearing, with arraignment and initial pretrial conference, set for 11/2/2005 at 10:00 AM at 401 Federal Building, Grand Rapids, MI before Magistrate

DATE	DOCKET NUMBER	PROCEEDINGS
		Judge Ellen S. Carmody; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 10/31/2005)
10/31/05	8	ORDER APPOINTING FEDERAL PUBLIC DEFENDER as counsel for defendant Jason Louis Tinklenberg; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 10/31/2005)
10/31/05	9	ARREST WARRANT RETURNED EXECUTED; defendant Jason Louis Tinklenberg arrested on 10/31/05 (mdr,) (Entered: 10/31/2005)
10/31/05		ARREST of Jason Louis Tinklenberg (mdr,) (Entered: 10/31/2005)
10/31/05	10	MINUTES of FIRST APPEARANCE of defendant Jason Louis Tinklenberg held before Magistrate Judge Ellen S. Carmody; defendant's request for court appointed counsel granted; gov't seeks detention and deft re-

DATE	DOCKET NUMBER	PROCEEDINGS
		manded to custody of USM pending further proceedings (Proceedings Digitally Recorded) (Magistrate Judge Ellen S. Carmody, mdr) (Entered: 10/31/2005)
10/31/05		Copy of Order on Motion to Amend/Correct, 6 as to defendant Jason Louis Tinklenberg distributed to USM, US Probation (ele) (Entered: 10/31/2005)
11/1/05		Federal Public Defender recommends that Lawrence J. Phelan be appointed to represent defendant Jason Louis Tinklenberg (Federal Public Defender,) (Entered: 11/01/2005)
11/2/05	12	MINUTES as to defendant Jason Louis Tinklenberg held before Magistrate Judge Ellen S. Carmody; time set for Arraignment, Pretrial Conference and Detention Hearing; hearings did not take place; defense counsel requested psych eval for sanity and competency - granted; order to issue (Proceedings Digitally Recorded) (Magistrate Judge

DATE	DOCKET NUMBER	PROCEEDINGS
		Ellen S. Carmody, mdr) (Entered: 11/02/2005)
11/2/05	13	ORDER as to defendant Jason Louis Tinklenberg: pretrial conference set for 12/27/2005 at 03:30 PM at 499 Federal Building, Grand Rapids, MI before Judge Gordon J. Quist; jury trial set for 1/3/2006 at 08:30 AM at 499 Federal Building, Grand Rapids, MI before Judge Gordon J. Quist; ; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, mil) (Entered: 11/02/2005)
11/2/05	14	ORDER for psychiatric evaluation of defendant Jason Louis Tinklenberg (certified copy hand delivered to USMS by cbh); signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 11/02/2005)
11/7/05	15	CJA 20 APPOINTMENT of attorney Lawrence J. Phelan for Jason Louis Tinklenberg; signed by Magistrate Judge Ellen S.

DATE	DOCKET NUMBER	PROCEEDINGS
		Carmody (gjf) (Entered: 11/08/2005)
12/16/05	16	NOTICE *of Request for Extension of Time to Complete Psychological and Competency Evaulation* by USA as to Jason Louis Tinklenberg (Attachments: #1 Proposed Order) (Woods, Julie) (Entered: 12/16/2005)
12/19/05	18	MOTION for extension of time to file *report* by Jason Louis Tinklenberg; (elc,) (Entered: 12/27/2005)
12/20/05	17	ORDER as to defendant Jason Louis Tinklenberg; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, mil) (Entered: 12/20/2005)
12/21/05		Copy of Order 17 as to defendant Jason Louis Tinklenberg distributed to USM (final pretrial conf and trial is held in abeyance) (elc) Modified on 12/21/2005 to edit text (elc). (Entered: 12/21/2005)
12/28/05	19	ORDER granting request of the Federal Bureau of Prisons for a

DATE	DOCKET NUMBER	PROCEEDINGS
		30-day extension of time to complete the psychological evaluation of defendant Jason Louis Tinklenberg (1) 18; the evaluation shall be completed by 2/13/2006; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 12/28/2005)
12/29/05		Copy of Order on Motion for Extension of Time to File 19 as to defendant Jason Louis Tinklenberg faxed to Bureau of Prisons by cbh and hand delivered to USM by cbh (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 12/29/2005)
2/10/06	20	AMENDED MOTION for extension of time to file *psychological and competency evaluation* by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 02/10/2006)
2/17/06	21	ORDER granting Government's Amended Second Request for Extension of Time to Complete Psychological and Competency Evaluation 20 as to Jason Louis

DATE	DOCKET NUMBER	PROCEEDINGS
		Tinklenberg (1); the Metropolitan Correctional Center shall have until 3/13/2006 to complete the evaluation of the defendant; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 02/17/2006)
3/17/06	22	NOTICE OF HEARING as to Jason Louis Tinklenberg: competency hearing set for 3/22/2006 at 09:00 AM at 401 Federal Building, Grand Rapids, MI before Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 03/17/2006)
3/20/06	23	NOTICE OF HEARING as to Jason Louis Tinklenberg: competency hearing rescheduled to 3/22/2005 at 04:00 PM at 401 Federal Building, Grand Rapids, MI before Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 03/20/2006)
3/20/06	24	ORDER to seal Forensic Report and Addendum to Forensic Re-

DATE	DOCKET NUMBER	PROCEEDINGS
		port as to Jason Louis Tinklenberg; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 03/20/2006)
3/20/06	25	SEALED PSYCHIATRIC REPORT received as to Jason Louis Tinklenberg (mdr,) (Entered: 03/21/2006)
3/22/06	26	NOTICE OF HEARING as to defendant Jason Louis Tinklenberg: Arraignment, Initial Pretrial Conference, and Detention Hearing set for 3/23/2006 at 04:30 PM at 401 Federal Building, Grand Rapids, MI before Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 03/22/2006)
3/22/06	27	MINUTES of competency hearing as to defendant Jason Louis Tinklenberg held before Magistrate Judge Ellen S. Carmody; defendant found competent to stand trial; defendant remanded to custody of USM (Proceedings Digitally Recorded) (Magistrate

DATE	DOCKET NUMBER	PROCEEDINGS
		Judge Ellen S. Carmody, mdr) (Entered: 03/22/2006)
3/23/06	28	ORDER as to defendant Jason Louis Tinklenberg: Defendant is found competent within the meaning of 18 U.S.C. 4241(d); this order does not address defendant's mental state at the time of the offense; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 03/23/2006)
3/24/06	29	MINUTES of ARRAIGNMENT, initial pretrial conference and DETENTION hearing as to Jason Louis Tinklenberg (1) held before Magistrate Judge Ellen S. Carmody; defendant entered a plea of not guilty as to Counts 1-3; defendant remanded to custody of USM pending trial (Proceedings Digitally Recorded) (Magistrate Judge Ellen S. Carmody, mdr) (Entered: 03/24/2006)
3/23/06	30	PRETRIAL CONFERENCE SUMMARY ORDER as to defendant Jason Louis Tinklenberg;

DATE	DOCKET NUMBER	PROCEEDINGS
		jury trial estimated to last 2 days; motions to be filed no later than 3 weeks from today's date; signed by Magistrate Judge Ellen S. Carmody (mdr,) (Entered: 03/24/2006)
3/24/06	31	INITIAL DISCOVERY ORDER as to defendant Jason Louis Tinklenberg; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 03/24/2006)
3/24/06	32	ORDER OF DETENTION pending trial as to defendant Jason Louis Tinklenberg; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 03/24/2006)
3/27/06	33	ORDER as to defendant Jason Louis Tinklenberg: pretrial conference set for 5/15/2006 at 03:00 PM at 499 Federal Building, Grand Rapids, MI before Judge Gordon J. Quist; jury trial set for 5/30/2006 at 08:30 AM at 499 Federal Building, Grand Rapids,

DATE	DOCKET NUMBER	PROCEEDINGS
		MI before Judge Gordon J. Quist; ; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, mil) (Entered: 03/27/2006)
3/29/06	34	EX PARTE PETITION for an independent forensic competency and mental evaluation by Jason Louis Tinklenberg; (Attachments:, # 1 Proposed Order) (ele,) Modified on 4/3/2006 to edit text (ele). (Entered: 04/03/2006)
3/29/06	35	PROOF OF SERVICE by Jason Louis Tinklenberg re MOTION for psychiatric exam 34 (ele,) (Entered: 04/03/2006)
4/17/06	36	ORDER for psychiatric evaluation of defendant Jason Louis Tinklenberg by Jeffrey T. Kieliszewski, Ph.D.; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, ebh) (Entered: 04/17/2006)
4/19/06		Cert Copy of Order for Psychiatric Evaluation 36 as to defendant Jason Louis Tinklenberg distributed to USM (ele) (Entered: 04/19/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
4/26/06	37	PRO SE MOTION to appoint counsel by Jason Louis Tinklenberg; (Attachments:, # 1 Attachment 1, # 2 Attachment 2) (ele,) (Entered: 04/27/2006)
5/9/06	38	MOTION to withdraw as attorney by Lawrence J. Phelan by Jason Louis Tinklenberg; (Attachments: # 1 Attachment Memorandum in Support of Counsel's Motion to Withdraw as Counsel) (Phelan, Lawrence) (Entered: 05/09/2006)
5/15/06	39	MINUTES of pretrial conference as to defendant Jason Louis Tinklenberg held before Judge Gordon J. Quist (Court Reporter: Diane Calsbeek) (Judge Gordon J. Quist, mil) (Entered: 05/15/2006)
5/16/06	40	ORDER REFERRING MOTION as to Jason Louis Tinklenberg 38 MOTION to withdraw as attorney by Lawrence J. Phelan filed by Jason Louis Tinklenberg, 37 PRO SE MOTION to appoint counsel filed by Jason Louis Tinklenberg. OR-

DATE	DOCKET NUMBER	PROCEEDINGS
		DER ADJOURNING TRIAL DATE; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, mil) (Entered: 05/16/2006)
5/17/06		Copy of Order Referring Motion, 40 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (ele) (Entered: 05/17/2006)
5/30/06	41	NOTICE OF HEARING ON MOTION as to defendant Jason Louis Tinklenberg regarding document numbers 37 and 38: motion hearing is set for 6/5/2006 at 02:00 PM at 401 Federal Building, Grand Rapids, MI before Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 05/30/2006)
5/31/06	42	AMENDED NOTICE OF HEARING ON MOTION as to defendant Jason Louis Tinklenberg regarding document numbers 37 and 38: motion hearing is rescheduled to 6/7/2006 at 03:30 PM at 401 Federal Building, Grand Rapids, MI before Magis-

DATE	DOCKET NUMBER	PROCEEDINGS
		trate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 05/31/2006)
5/31/06		Copy of Notice of Hearing on Motion, 41, 42 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg (rlw,) Modified on 5/31/2006 to edit text (rlw,). (Entered: 05/31/2006)
6/7/06	43	MINUTES of motion hearing as to defendant Jason Louis Tinklenberg re 38 MOTION to withdraw as attorney by Lawrence J. Phelan filed by Jason Louis Tinklenberg and 37 PRO SE MOTION to appoint counsel filed by Jason Louis Tinklenberg held before Magistrate Judge Ellen S. Carmody; detention continued (Proceedings Digitally Recorded) (Magistrate Judge Ellen S. Carmody, mdr) (Entered: 06/08/2006)
6/9/06	44	ORDER granting Defendant's Pro Se Motion for New Counsel 37 and Defendant's Counsel's Motion to Withdraw 38 as to Ja-

DATE	DOCKET NUMBER	PROCEEDINGS
		son Louis Tinklenberg (1); signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 06/09/2006)
6/9/06	45	ORDER APPOINTING FEDERAL PUBLIC DEFENDER as new counsel for defendant Jason Louis Tinklenberg; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, cbh) (Entered: 06/09/2006)
6/9/06	46	SEALED PSYCHOLOGICAL EVALUATION received as to Jason Louis Tinklenberg (mdr,) (Entered: 06/12/2006)
6/13/06	47	ORDER as to defendant Jason Louis Tinklenberg: pretrial conference set for 8/8/2006 at 02:30 PM at 499 Federal Building, Grand Rapids, MI before Judge Gordon J. Quist; jury trial set for 8/15/2006 at 08:30 AM at 499 Federal Building, Grand Rapids, MI before Judge Gordon J. Quist; ; signed by Judge Gordon

DATE	DOCKET NUMBER	PROCEEDINGS
		J. Quist (Judge Gordon J. Quist, mil) (Entered: 06/13/2006)
6/15/06	48	ATTORNEY APPEARANCE of Richard D. Stroba for defendant Jason Louis Tinklenberg (Stroba, Richard) (Entered: 06/15/2006)
6/15/06	49	ORDER REJECTING PLEADING (letter re proceedings on 6/7/06); signed by Magistrate Judge Ellen S. Carmody (Attachments:, # 1 Proposed Document) (elc) (Entered: 06/16/2006)
6/16/06		Copy of Order Setting Pretrial and Jury Trial, 47 as to defendant Jason Louis Tinklenberg distributed to Richard D. Stroba (elc) (Entered: 06/16/2006)
6/16/06		Copy of Order Rejecting Pleading 49 as to defendant Jason Louis Tinklenberg mailed to Jason Louis Tinklenberg w/proposed document (elc) (Entered: 06/16/2006)
6/20/06	50	LETTER from deft requesting copies of various documents; mailed docket sheet and in-

DATE	DOCKET NUMBER	PROCEEDINGS
		formed deft of the prepayment requirement before his request can be filled re Jason Louis Tinklenberg (elc,) Modified on 6/23/2006 to edit text (elc). (Entered: 06/23/2006)
6/27/06	51	TRANSCRIPT of Initial Appearance held October 31, 2005 before Hon. Ellen S. Carmody, US Mag. Judge as to Jason Louis Tinklenberg (Transcriptionist: Pritchard, Pat) (Entered: 06/27/2006)
6/27/06	52	TRANSCRIPT of Arraignment/ IPC/Detention Hearing held November 2, 2005 before Hon. Ellen S. Carmody, US Mag. Judge as to Jason Louis Tinklenberg (Transcriptionist: Pritchard, Pat) (Entered: 06/27/2006)
6/27/06	53	TRANSCRIPT of Competency hearing held March 22, 2006 before Hon. Ellen S. Carmody, US Mag. Judge as to Jason Louis Tinklenberg (Transcriptionist: Pritchard, Pat) (Entered: 06/27/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
6/27/06	54	TRANSCRIPT of Motion hearing held March 23, 2006 before Hon. Ellen S. Carmody, US Mag. Judge as to Jason Louis Tinklenberg (Transcriptionist: Pritchard, Pat) (Entered: 06/27/2006)
6/27/06	55	ORDER REJECTING PLEADING (request for investigation of an attorney); signed by Magistrate Judge Ellen S. Carmody (Attachments:, # 1 Proposed Document) (elc) Modified on 8/22/2006 to correct spelling (elc). (Entered: 06/30/2006)
6/30/06		Copy of Order Rejecting Pleading 55 w/proposed document mailed to Jason Tinklenberg at the Newaygo Co. Jail, PO Box 845, White Cloud, MI 49349 (elc) (Entered: 06/30/2006)
7/5/06	56	TRANSCRIPT of Final Pretrial held May 15, 2006, before the Hon. Gordon J. Quist, as to Jason Louis Tinklenberg (Court Reporter: Calsbeek, Diane (616) 451-3587) Modified on 7/6/2006 to

DATE	DOCKET NUMBER	PROCEEDINGS
		correct date (elc). (Entered: 07/05/2006)
7/25/06	57	ADMINISTRATIVE ORDER number 06-072 reassigning case as to defendant Jason Louis Tinklenberg to Senior Judge Richard Alan Enslen for all further proceedings; Judge Gordon J. Quist no longer assigned to case; signed by Chief Judge Robert Holmes Bell (elc) (Entered: 07/25/2006)
7/25/06	58	CASE MANAGEMENT ORDER as to defendant Jason Louis Tinklenberg: pretrial conference set for 8/7/2006 at 02:30 PM at 174 Federal Building, Kalamazoo, MI before Senior Judge Richard Alan Enslen; jury trial set for 8/14/2006 at 08:30 AM at 174 Federal Building, Kalamazoo, MI before Senior Judge Richard Alan Enslen; ; signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, sas) (Entered: 07/25/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
8/1/06	59	PROPOSED JURY INSTRUCTIONS by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/01/2006)
8/1/06	60	MOTION to take video deposition by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/01/2006)
8/1/06	61	PROPOSED ORDER re 60 by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/01/2006)
8/2/06	62	PROPOSED VOIR DIRE by Jason Louis Tinklenberg (Stroba, Richard) (Entered: 08/02/2006)
8/2/06	63	ORDER TO RESPOND to plaintiff's motion for a video deposition 60 as soon as possible, but not later than August 9, 2006 as to defendant Jason Louis Tinklenberg ; signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 08/02/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
8/2/06	64	RESPONSE to Motion by Jason Louis Tinklenberg re MOTION to take video deposition 60 (Stroba, Richard) (Entered: 08/02/2006)
8/3/06	65	ORDER granting motion to take video deposition 60 as to Jason Louis Tinklenberg (1), parties shall schedule the deposition posthaste so as not to delay trial; signed by Senior Judge Richard Alan Enslen (Senior Judge Richard Alan Enslen, blb) (Entered: 08/03/2006)
8/3/06	66	TRIAL BRIEF by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/03/2006)
8/3/06	67	NOTICE *of Video deposition of Joshua Howk* by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/03/2006)
8/3/06	68	NOTICE *AMENDED Notice of Video Deposition of Joshua Howk* by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/03/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
8/7/06	69	MINUTES of pretrial conference as to defendant Jason Louis Tinklenberg held before Senior Judge Richard Alan Enslen (Court Reporter: Kathleen Thomas) (Senior Judge Richard Alan Enslen, blb) (Entered: 08/07/2006)
8/8/06	70	REQUEST and PROPOSED ORDER by USA as to Jason Louis Tinklenberg seeking to permit firearm to enter the courthouse and to be stored pending conclusion of trial (Woods, Julie) (Entered: 08/08/2006)
8/8/06	71	PROPOSED ORDER re 70 *to Permit Firearm to Enter the Courthouse and to be Stored Overnight Pending Conclusion of Trial* by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/08/2006)
8/8/06	72	PROPOSED VOIR DIRE by USA as to Jason Louis Tinklenberg (Woods, Julie) (Entered: 08/08/2006)

Attachment 2:

Mar. 16, 2006 Letter

[SEAL OMITTED] U.S. Department of Justice
Federal Bureau of Prisons
Metropolitan Correctiomal Center

71 W. Van Buren Street
Chicago, IL 60605

Mar. 16, 2006

The Honorable Ellen S. Carmody
United States District Court Magistrate Judge
Western District of Michigan
402 Federal Buildlng
110 Michigan Street NW
Grand Rapids, MI 49503

RE: TINKLINBERG. Jason
Docket No.: 1 :05-cr-00239
Reg. No.: 12507-040

Dear Judge Carmody:

This is in response to your court order dated November 2, 2005, which committed Mr. Tinklinberg to an examination and evaluation pursuant to Title 18, United Slates Code, Sections 4241 and 4242. Mr. Tinklinberg was designated to the Metropolitan Correctional Center (MCC) Chicago, Illinois, on November 10, 2005, and arrived at the institution on November 30, 2005.

Enclosed are copies of the reports completed by Dr. Nieberding, Clinical Psychologist at MCC Chicago. Two separate reports have been included due to the distinction between the questions raised by the court pertaining to Mr. Tinklinberg's psychological condition. The

competency evaluation was conducted with regard to the defendant's current mental status, while the criminal responsibility examination concerns the defendant's mental status only at the time of the alleged offenses.

The American Bar Association's Criminal Justice Mental Health Standards advocates for the preparation of separate reports to avoid confusing the criteria for competency to stand trial with those assessing criminal responsibility. The ethical standards of forensic psychologists also recommends not to include potentially incriminating information regarding the alleged offense, in a competency report. Providing two separate reports allows the court the option of setting aside the findings of the criminal responsibility evaluation, until the issue of competency has been resolved. Per your request, a copy of the competency report has been forwarded directly to counsel for the defense and prosecution. Additional copies of the criminal responsibility report have also been included for distribution to the attorneys, at the discretion of the court.

If you should have any questions regarding the report, please contact Dr. Nieberding at (312) 322-0567, Ext. 468. If you have any other questions, you may contact me at extension 500.

Sincerely,

/s/ SILAS M. IRVIN
SILAS M. IRVIN
Warden

cc: Defense Counsel
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Aug. 11, 2006

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

The United States, through its attorneys, Margaret M. Chiara, United States Attorney for the Western District of Michigan, and Julie Ann Woods, Assistant United States Attorney respond to the Defendant's Motion to Dismiss as follows:

COMPUTATION OF THE SPEEDY TRIAL ACT

The government accepts the defendant's computation of 74 days as of August 14, 2006. The defendant filed his motion today, August 11, 2006, thereby tolling the Speedy Trial Act as of today. The Speedy Trial Act computation is either at 70 days as of yesterday, August 10, 2006, or seventy one days as of today.

DISCUSSION

In *Barton v. Wingo*, 407 U.S. 514, 530-33 (1972), the Supreme Court provided a four part test for Speedy Trial Act violations. The test balances the following (1) length of delay; (2) reason for delay; (3) how the defendant asserted the Speedy Trial right and (4) the prejudice to the defendant.

The first criteria is the length of the delay. In the instant case, as of yesterday, under the defense computation seventy days have elapsed. Generally, the delays involved months, if not years of non-excludable days. *Barker* at 530; *Doggett v. U.S.*, 505 U.S. 647, 651-52 (1992); *U.S. v. Thomas*, 167 F.3d 299, 304, (6th Cir. 1000) (*Thomas* involved a twenty-nine month delay in resentencing defendant.)

The next criteria is the cause of the delay. All of the excludable days are a result of defense attorney or the defendant himself filing motions regarding competency and requests for new counsel. The prosecution did nothing to delay the case. The prosecution has not gained any advantage in this case by any of the excludable or non-excludable days under the Speedy Trial Act.

The third criteria is how the defendant asserted the speedy trial right. In the instant case the motion regarding the Speedy Trial Act is one day past its limitations. This could either be viewed as a timely motion (*see Wilson v. Mitchell*, 250 F.3d 388, 396 (6th Cir. 2001)), or, on the other hand, if numerous motions filed by the defendant may have caused the speedy trial delay, it will not be viewed favorably for the defendant (*see U.S. v. O'Dell*, 247 F.3d 655, 671-72 (6th Cir. 2001).

The final consideration is whether the defendant is prejudiced by the delay. The types of prejudice include (1) oppressive incarceration, (2) anxiety and concern, and (3) impairment of the defense. *Barker* at 532; and *Doggett* at 654.

If in fact there is a delay at all, the Court should dismiss the case *without* prejudice. The defendant has not been prejudiced by any delay of one to four days. In *U.S. v. Carnes*, 309 F.3d 950 (6th Cir. 2002) a delay of eight days with no evidence that the government was responsible for any of the delay provided grounds for a dismissal *without* prejudice. In *U.S. v. Robinson*, 389 F.3d 582 (6th Cir. 2004), the case was dismissed without prejudice in part because the defendant's motions had in part created the situation resulting in the delay.

CONCLUSION

According to defendant's calculations, yesterday was the 70th day. On the 71st day he filed a motion tolling the Speedy Trial Act. Either the case is at seventy days as of today or, if the Court finds otherwise, the dismissal must be without prejudice.

Respectfully submitted,

MARGARET M. CHIARA
United States Attorney

Dated: Aug. 11, 2006

/s/ JULIE ANN WOODS
JULIE ANN WOODS
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Aug. 11, 2006

SUPPLEMENT TO GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

The United States, through its attorneys, Margaret M. Chiara, United States Attorney for the Western District of Michigan, and Julie Ann Woods, Assistant United States Attorney respond to the Defendant's Motion to Dismiss as follows:

COMPUTATION OF THE SPEEDY TRIAL ACT

On Friday August 1, 2006 at about 5:55 P.M. in the government's response to Defendant's motion to dismiss, filled at about 3:30 P.M. on that same date, the government accepted the Defendant's Speedy Trial Act, (STA), computations which asserted that as of the trial date, August 14, 2006, seventy-four days that are countable under the STA. Upon careful review by this writer and other Assistant United States Attorneys, the gov-

ernment believes that only sixty-six countable days under the STA have elapsed.

It is important to note that the days the Defendant appeared in court are not to be counted. Rule 45(a)(1), Fed. R. Cr. Pro. Additionally, legal holidays are also excluded. Rule 45(a)(4)(A)(v).

The following chart provides an over view of how that figure has been determined:

Docket #		Date	Excluded	Included
7	Initial Appearance	10/31/05	1	
12	Defense Motion for Psych.	11/2/05	1	1
22	Competency Hearing	3/22/06	139	
29	Arraignment	3/23/06	1	
34	Def. Motion for Psych	3/29/06		5
37	ProSe Motion, New Atty.	4/26/06		
38	Motion to Withdraw	5/9/06		
39	Final Pretrial	5/15/06	70	
43	Hearing	6/7/06	1	
67	Final Pretrial	8/7/06	1	58
	Video Deposition	8/10/06	1	2
	Motion to Dismiss	8/11/06		
	Trial	8/14/06	3	
			TOTAL:	66

If the preceding calculations are correct, the case has not exceeded the requirements of the Speedy Trial Act.

CONCLUSION

If the government's calculations are correct, the STA has not been violated. If Defendant is correct and today is the seventy-fourth day, the dismissal must be without prejudice for the reasons stated in the government's responsive pleading dated August 11, 2006.

Respectfully submitted,

MARGARET M. CHIARA
United States Attorney

Dated: Aug. 11, 2006

/s/ JULIE ANN WOODS
JULIE ANN WOODS
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Aug. 15, 2006

DEFENDANT'S MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND BRIEF IN SUPPORT

NOW COMES the defendant, Jason Louis Tinklenberg, by his attorney Richard D. Stroba of the Federal Public Defender Office to hereby move this Honorable Court to reconsider its Order entered August 14, 2006 denying the defendant's motion to dismiss this case due to a violation of the Speedy Trial Act. (Hereinafter "STA") This request for reconsideration is based upon a legal error in the calculation of the excludable time by the Court in reaching its conclusion that 69 (and not 70 or 71) days had elapsed and a mathematical error in its calculations.

I. **Legal Error**

In its footnote 2 on page 3 of its Order the Court, in explaining the reasoning as to why only 69 days had elapsed and not more; states that the defendant failed " . . . to account for the excluded periods from August 1, 2006, to August 3, 2006, and August 8, 2006 to August 10, 2006." It would appear that the Court excluded a total of 3 days for the period from August 1 to August 3 and again 3 days from August 8 to August 10. This exclusion of all the days from the date the motion is filed to the date the motion is started is legally erroneous and contrary to Sixth Circuit precedent.

When calculating days excludable from the seventy days allowed under the STA, courts in the Sixth Circuit should *not* include the date a motion is filed. The court in *United States v. Thomas*, 49 F.3d 253, 256 (6th Cir. 1995), is clear: "This circuit does not include the date a motion was filed in the calculation [of days elapsed for STA purposes], unless the date was also the date an order was entered resolving the motion." Only days actually elapsed between the date a motion is filed and the date upon which it is disposed of are considered in an STA analysis. *Id.*

In *United States v. Bowers*, 834 F.2d 607, 609 (6th Cir. 1987), the court considered a case in which a pretrial motion was filed on April 30th. *Id.* It made this exclusion in the course of finding excludable days and eventually ruling against the defendant and finding the government's filing of an indictment to be timely. *Id.* In *United States v. Thomas*, 49 F.3d 253, 256 (6th Cir. 1995), the court ruled against the government, finding that the latter had excluded too many days when it

failed to count, as elapsed for STA purposes, the days upon which motions had been filed.

Bowers and *Thomas* present situations akin to that presented in Mr. Tinklenberg's case. The Court here has considered the day on which this Motion to Dismiss was filed in concluding that only sixty-nine days have elapsed for purposes of the STA. (See Order at 203). Under *Thomas*, it is clear that only if this Court had decided the motion on the date it was fied (August 11) would that day be counted. However, the Court did not decide the motion until August 14, so only the 12th, 13th, and 14th are excluded from the STA calculation—*not* the 11th. Therefore, under the court's own calculation, seventy days have elapsed for the purposes of the STA if August 11 is properly not excluded from the STA time.

Furthermore, the judge counted the days the motions for the video deposition and the permission to store a firearm were filed as days excluded under the STA. (Order at 2-3.) These two days, like any day upon which a motion is filed (if not decided that day), are not excluded under the STA, so that here there are an additional two elapsed days incorrectly excluded by the Court. Given this calculation, at least seventy-two days had elapsed under the STA by August 11, 2006. Therefore, the statute mandated dismissal of the charges.

II. Mathematical error

The Court found that as of August 1, 2006, the date the video deposition motion was filed, sixty-six speedy trial days had elapsed. (Order, page 2.) The clock stopped to restart August 3, 2006, when the motion was decided. The Court states that the clock restarted that day and stopped again August 8, 2006, when sixty-nine

days had elapsed. However, August 4, August 5, August 6, and August 7 are a total of 4 days, not 3 days, as the Order seems to count them. Sixty-six days plus four days equals 70 days making Friday, August 11, 2006, actually the 70th day. Trial had not commenced by that day, therefore, the clock had run. (See Part I above as to why the 11th is a day not counted against the clock.)

III. The STA was violated when it took the government twenty days to move defendant to MCC - Chicago, a delay presumed unreasonable by the STA

Under the STA, 18 U.S.C. § 3161(h)(1)(H), delay resulting from movement of a defendant for examination are excluded from a calculation of elapsed days. However, any delay over ten days from the date an order is issued until the defendant's arrival at a facility is presumed unreasonable. *Id.* In Mr. Tinklenberg's case, he was designated for examination on November 10th and did not arrive in Chicago for the examination until November 30th. This delay is presumptively unreasonable under the STA, so the excess days should be considered for purposes of the STA.

The Court's Order did not address the last ten-day period from November 20, 2005 to November 30, 2005. In that the burden to demonstrate that any period of delay to be excluded for the STA calculation is upon the government, and that the government did not demonstrate in any manner that the time in excess of 10 days for transport should be excluded, this additional ten-day period should be included in the STA calculation. If this additional 10 days is not to be included, the Court's Order should reflect the reasons therefore for the purposes

of review should the defendant seek a review of this decision.

CONCLUSION

The defendant recognizes that the Court has made its ruling and the defendant does not wish to belabor the point. However, it would appear that, on its face, there have been clear and palpable errors on the law and in the mathematics involved in the STA calculations done here. Therefore, the defendant believes it appropriate to bring these to the Court's attention for the Court to take the opportunity to review its decision for accuracy in both areas. It is important for the record to reflect that due consideration has been given to these additional issues.

Respectfully submitted,

RAY KENT
Federal Public Defender
/s/ Richard D. Stroba
Assistant Federal Public Defender
50 Louis, N.W. - Suite 500
Grand Rapids, MI 49503-2633
616-742-7420

Dated: Aug. 15, 2006

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Dear Honorable Enslen,

My name is Jason Tinklenberg I am a federal Inmate at the Kalamazoo County Jail.

I was previously before you in your court Tuesday, August, 15, 2006, and convicted by Jury Wednsday, August 16, 2006.

I have also informed you of my ineffective Counsel.

It was with no merit, that I may have came through with a not guilty plea; when my lawyer Richard Stroba gave admittance to my being guilty, and saying to the jury: that I agreed to all of the searches. This was against my discresion and these accusations have introduced a miscarriage of Justice on my behalf.

I have made it abundantly clear, to Mr. Stroba, that I am not guilty. That I have entered a plea of not-guilty. and that I want him to support me in my not guilty Plea. In all evidence, arguments and opening statements.

Mr. Stroba has not to the best of his ability, support me in these proceedings. Mr. Stroba also has not produced to the jury; the evidence to prove the plaintiffs accusations to be Frivolous.

This trial and conviction was unorganized, and unjustifiable if not a miscarriage of Justice.

I would request your honor for a retrial, or a dismissal on grounds of the speedy trial act.

As you know in the criminal Procedure handbook 18 § 3162 Sanctions (a)(2)

If the defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h) the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion; but the government shall have the burden of going foward with the evidence in connection with any exclusions of time under subparagraph 3161(h)(3)

In determining whether to dismiss the case with or without prejudice.

I have taken proper procedures in this statute and was denied the approval of this motion, which constitutes the start of an unfair trial.

Without hesitation, as a whole my lawyer Richard Stroba has entered information to the Jury, that without a doubt is/was damaging to my case.

These statements being against my discretion. Mr. stroba failed to enter evidence physical and verbal. OR knowingly did not produce available witnesses.

Which brings me to statute (b)

(b) In any case in which counsel for the defendant or the attorney for the government (1) Knowingly allows the case to be set for trial without disclosing the facts, that a necessary witness would be unavailable for trial (2) files a motion solely for the purpose of delay which he/she knows is totally frivolous and without merit (3) Makes a statement.

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for the purpose of obtaining a continuance; which he/she knows to be false and which is material to the granting of a continuance; (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney for the government.

As it stands Ms. Woods was aware that I need to get out on bond, to better Fight my case and locate necessary witnesses. We have discussed this in previous proceedings in front of magistrate Carmody - along with my Lawyer Larry Phalen.

As far as the records show, bond was promised and as it stands bond is still an issue, along with my witnesses is an issue.

Richard Stroba has previous knowledge of witnesses that are unavailable formely because my due process rights are/have been violated. As the record shows Attorney For the government - Ms. Woods along with Richard Stroba has allowed trial to commence.

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5 of 6

I would also like to add for the record frivolous motions without merit have been filed: I believe to have taken place on these dates.

1) August 8, 2006 (seeking permit for firearm in the courtroom) was an order and granted the same day. This is 1 day not 3 days.

2) August 1, 2006 Motion for video deposition was granted without defendants response was granted in 2 days
The defendant did not know anything about a response via the goverment granting the motion. Did not stipulate to this.

3) March 29th 2006. There was not a full valid 30 day examination completed this Frivolous attempt to tell the clock I came Back from MCC Chicago Competent. There was no proof of service. I never signed any proof of service or document.

4) ~~October~~ 14, 2005. to Oct, 31, 2005 6-7 days

5) ~~time~~ teuton to transport From Kalamazoo to Grand Rapids in excess of 10 days.

6 of 6

9) I was designated to MCC-FCI on November 10th, 2005 and did not arrive until Nov 30th, 2005 Section 3161(h)(1)(H) presumptively limits excludable "delay resulting from transportation of any defendant.... to and from places of examination or hospitalization" to 10 days see. United States vs. Castle 906 F2d 134, 139-38 5th 1990)

Ordinary institutionalized delay is not an excuse. (only 10 of the 20 days between order for psychiatric examination and defendant's arrival at MCC Chicago is excludable even though U.S. Marshals' service did not act in bad faith, but new when this act was passed, Congress knew all about the customs and practices of the prison bus).

I was designated Nov 10, 2005, and did not arrive until Nov, 30, 2005. Therfore 10 days of the transportation time is excludable and 10 days are not, in accordance with § 3161(h)(1)(H). Thank you your honor for taking the time to read my motion for the record.

"God Bless You" Respectfully Submitted.

Jason [redacted]

Case 1:05-cr-00239-RAE [redacted]

Todays date 10-16-06

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED OK

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UNITED STATES OF AMERICA,
Plaintiff,

Case No. 1:05-cr-239
HON. Richard Alan Enslen Sr.
United States District Judge

JASON LOUIS TINKLENBERG,
Defendant,

DEFENDANT'S MOTIONS TO BELABOR FOR A REVIEW, OF ORDER DENYING DEFENDANTS MOTION TO DIMISS AS TO A VIOLATION OF DEFENDANTS SPEEDY TRIAL ACT RIGHTS AND BRIEF IN SUPPORT.

NOW COMES the defendant Jason Louis Tinklenberg Pro Se, and hereby moves this Honorable Court to dismiss the instant case, due to a violation of the speedy trial Act pursuant to 18 U.S.C §§ 3161 and 3162.
This motion is revised as to the pro se, defendants calculations.

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Facts

The defendant is charged with being a felon in Possession of a firearm in violation of 18.U.S.C 924(g)(1). The defendant is also accused of being in possession of meth Lab components in violation of 21 U.S.C. § 843(2)

Mr. Tinklenberg made his initial appearance in This matter on October 31, 2005. He was initially arrested October 14, 2005

Since that time a number of events and proceedings have taken place, including the following:

10-14-05 - **Arrested** set in Kalamazoo County awaiting transport from one facility to another.

10-20-05 - **Indictment** was issued.

10-31-05 - **Initial Appearance** - Magistrate Carmody.

11-2-05 - **Arraignment** - scheduled for this date (but hearing not held due to request for Forensic Psychiatric Examination), Forensic psychiatric Exam. ordered.

11-10-05 - **Defendant designated** by B.O.P. to MCC Chicago for examination (Letter of 3-16-06) A#2

11-20-05 - **Newaygo** - still sitting awaiting transport.

11-30-05 - **Defendant arrives** at MCC Chicago for exam.

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Facts continued

12-28-05 - Order granting 30-day extention for Completion of defendants psychological exam. # 19

2-17-06 Order granting extention for Completion of defendants psychological exam

3-17-06 - Completion of Exam - notice of hearing Set for 3/22/06

3-20-2006 rescheduled Hearing 3/22/06

3-22-2006 rescheduled Hearing for competancy 3/23/06

3-23-06 Arraignment - (not guilty plea entered) Initial pretrial conference and detention hearing held.

3-29-06 Ex Parte Petition for an independant forensic psychiatric exam for competancy filed This is a frivolous exam, that I never stipulated to, in which shows prejudice

3-29-06 Proof of service by Jason Louis Tinkkenbery re motion for psychiatric exam. This was frivolous and never occured. And there was no proof of service signed.

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FACTS continued

4-17-06 - order for psychiatric evaluation # 36
still remains no proof of service.

4-26-06 - Pro Se Motion to Appoint Counsel by defendant. #37

5-9-06 - Motion to withdrawl as counsel filed by
defendants attorney # 38

6-09-2006 order granting defendants pro se
motion for new counsel and Defendants counsel
motion to withdrawl. #45

6-15-06 New Counsel files appearance #48
As Richard D. Stroba.

7-25-2006 - case management order reassigning #57 #58
the case from Judge Quist to Judge Enslen

8-1-2006 Proposed Jury instructions and # 59
motion to take video deposition. # 60
This was ordered and granted the
same day I have proof.

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Facts continued

8-11-06 - Filed speedy trial act motion.

8-14-06 - Speedy trial act motion not granted

LAW AND Argument:

Generally Speaking "speedy trial" refers to the speed in which the government must bring a defendant to trial. A defendant has both a constitutional right and a statutory right to a speedy trial. The sixth Amendment of the United States Constitution states in part that "the accused shall enjoy the right to a speedy and public trial...." US Const. Amendment VI. The Federal Speedy trial Act attempts to quantify the time in which a defendant may be brougat to trial 18 U.S.C § 3161-3174
In the instant case, Jason Louis Tinklenberg brings his challenge under the Federal Speedy trial Act.

75

Right to speedy trial

In general, a delay approaching one year is considered presumptively prejudicial, depending on the nature and seriousness of the charges.
Doggett v. United States 505 U.S. 647, 652 (1992)

As to defendants delay to go to trial is prejudice as the initial Appearance was October 31, 2005 and trial was pushed without all of the facts to August 14, 2006 The defendant precludes that the charges are serious, but maintains his innocense to the alleged charges. This is considered presumptively prejudice.

With respect to the second factor, reason of delay. [b]ecause the prosecutor.... [has] an affirmative constitutional obligation to try the defendant in a timely manner.... The burden is on the prosecution to explain the cause of the pretrial delay.
United States v. Brown 169 F 3d 344, 349 (6th cir 1999)

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Right to Speedy trial

As to defendants expressions as to delay resulting from the governments prosecution delay remain as stands:

1) The original indictment had Spelling Errors as to indictee name Amended correction.
2) Initial Detention Hearing, The prosecution has anticipated the defendant, remanded into custody.
3) Governments auto matic extension to a 45 day evaluation and a 4 day late request for extension, for the second request.
4) Rescheduling hearings due to dockett congestion is presumptively prejudicial
5). Prosecution making false allegations toward my family and I. (relationship)
6) Prejudice as to a video deposition as to an essential witness, Joshua Hawk. I had objections to this motion of not appearing for trial.
7) Prosecution has never offered a plea agreement in Grand Rapids or Kalamazoo.
8) Prosecutions filing of motions to stall the clock
9) Prejudice resulting from recieving a competency report and rescheduling of the hearing.

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10) Government being responsable as to granting a second evaluation and also being prejudice is the documented frivolous Proof of Service I never stipulated to no such cause and I never signed anything.

11) Delay of 2 1/2 months to appoint new counsel and the frivolous Independant psychiatric evaluation.

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I. Statutory Challenge

In passing the Speedy Trial Act, Congress intended to create more clarity by setting specific time periods. United States v. Horton 705 F.2d 1414 (5th Cir) cert denied 464 U.S. 997 (1983) A violation of the Speedy Trial Act mandates the dismissal of the indictment or information with or without prejudice See, 18 U.S.C § 3162(1)(2)

The speedy trial Act provision implicated is 18 USC 3161(c)(1) which reads as follows:

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such a charge is pending, which ever date last occured.

In the instant case, the first issue that

HS

arises is whether § 3161(c)(1) applies. The plain language of the statute states that this section applies "[I]n any case which a plea of not guilty is entered". The plain meaning of the language of the speedy trial act requires a not guilty plea to begin the clock running. United States v. O'Dell, 154 F 3d 358, 360 (6th cir 1998) Mr. Tinklenberg was arraigned on March 23, 2006 and a not guilty plea was entered. The statute is clear that if a not guilty plea is entered, the trial must commence within seventy days from either (1) the filing date of the indictment or information; or (2) the date the defendant appeared before a judicial officer of the court § 3161(c)(1). The court begins counting the seventy days from whichever occurs last. Since the defendant first appeared before the judicial officer on an indictment, the speedy trial clock is triggered in the instant case by the date of the initial appearance of the defendant.

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In this case, the initial appearance was on 10-31-2005. The speedy trial clock, therefore, began that day. Since October 31, 2005, 287 days will have elapsed as of August 14, 2006. On its face, the speedy trial act has been violated.

Calculation of speedy trial Act time.

Title 18 U.S.C § 3161(h) sets forth numerous "periods of delay" that shall be excluded in computing the time within which the trial of any such offense must commence. The counting methods of Fed R. Crim P 45(a) are used in calculating speedy trial United States v. Edgecomb 910 F2d 1309, 1315 (6th Cir 1990)

Discussed below are the time periods that the defendants posits are excludable under the provisions of the speedy trial act. In all excludable time of 287 days. 81 days are not excludable under the speedy trial act and, therefore, even crediting all excludable time, a violation of the speedy trial Act has still occured in this case.

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Section 3161 (h)(1)(A) excludes "delay resulting from any proceeding, including any examination, to determine the mental competency or physical capacity of a defendant: see, United States v. Miranda, 986 F 2d 1283, 1284-85 (9th cir 1993) (affirming finding of 105 days of excludable delay under 3161(h)(1)(A) notwithstanding 45 day limit on competency examination under 18 USC §4247 (b) see also 3161(h)(4) (excluding "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial"). In the instant case, the defendant was to undergo a psychological evaluation. Under §3161(h)(1)(A) this time is excludable with some exceptions.

The defendant argues some exceptions to 3161(h)(1)(A), as to Honorable Magistrate Judge Carmody, had made a ruleing that my time would count and acknowledged this with my lawyer Larry Phalen. This was my reasoning to have the evaluation.

This is in the transcripts. Also I argue the fact that I came back competent and that these 30 day extentions were not effectively used.

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And I would argue the fact that the 30 day extentions are resulting in prejudice, and the time was prejudice and a waste of time.

As to the defendant being found competent the results are prejudice and may have help, lead to a miscarriage of justice.

time

The defendant was arrested October 14, 2005 awaiting transport from the marshalls at the Kalamazoo, County Jail. If you count the time transferred from one facility to another would be ten days. (excludable) which would bring to be October 24, 2005, IF the courts counted Oct, 25, 2005-Oct these includable days this would be added to be 6 days.

The defendants initial appearance before Magistrate Carmody was October 31, 2005 Counsel was appointed and the next date set was November 2, 2005. October 31, 2005 is not counted but November 1, 2005 is. This is one day or seven days if the court counts from October 24, 2005.

On November 2, 2005, a motion was made to refer the defendant for a forensic psychiatric evaluation. An order for examination was entered.

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The defendant was designated for examination at MCC - Chicago on November 10, 2005 and arrived at the facility on November 30th, 2005.

Nov 2, 2005, the motion for a forensic psychiatric evaluation was entered and granted that same day, so November 3rd, 2005 to November 9th 2005 are 7 includable days.

The defendant was designated November 10, 2005 and didn't arrive until November 30, 2005. The time which is excludable as to delay from transportation, from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendants arrival at the destination shall be presumed to be unreasonable.

So as it stands from November, 10, 2005 until November 20, 2005 are 10 excludable days from November 21 to November 30, 2005 are 9 includable days.

The forensic psychiatric report was recieved by the Court on March 20, 2006.

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although it was mailed on March 16, 2006. The defendants next appearance was scheduled for March 20, 2006 although the hearing was rescheduled for March 22, 2005 and rescheduled again for March 23, 2005 Defendants plea of not guilty was entered.

The next event that occured was a docketted, frivolous Exparte motion for an independant psychiatric evaluation, which the defendant didn't stipulate too and there is no proof of service, no signatures.

This motion was an attempt to stall the clock. This second request for an evaluation was against my discretion and could stem as a miscarriage of justice, and as prejudice to the defendant as to the defendant being found competent to stand trial out of MCC-Chicago.

The Defendant then appeared before Magistrate Carmody **and** march 23, 2006 and was found competent to stand trial.

From March 16, 2006 to March 21, 2006 defendant was in transport to return from MCC-Chicago. Os to March 22nd rescheduled

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hearing and appearance before Magistrate Carmody on March 23, 2006, for arraignment and an initial pretrial conference, once again I plead not guilty, and was competent to stand trial. This hearing was heard and granted that day.

From March 24, 2006 until March 28, 2006 these are 5 includable days.

March 29, 2006 was Docketted as a Frivolous Ex Parte motion for independant review and a frivolous attempt to be, docketted as proof of service. I never stipulated to an Ex Parte motion for an independant psychiatric examination, nor did I sign anything as to prove services, of this 2nd evalvation.

As to the docketted Ex Parte motion for an independant forensic psychiatric evalvation this was heard March 29, 2006 but recieved and sealed June, 9, 2006 This, if counted would be a total of 2 months and 10 days to recieve a sealed forensic Report, due to the magistrate Carmody only allowed 30 days for this motion. How it became a Ex Parte motion, I never wrote a motion

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That stipulates to the docketed Ex Parte motion for an Independant forensic psychiatric examination.

Stipulating to the U.S. Code 18, 3161 Time limits and exclusions subsection(J)

Delay reasonably attributed to any period not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

From March 30th, 2006 until June 9, 2006 are 40 excludable days

The dual motions to Change Counsel were heard and granted. Order appointing a Federal Public Defender as new Counsel.

From June 10, 2006 to ~~August~~ July 31, 2006 51 days will have elapsed. August 01, 2006 a motion for a video deposition was heard and granted, that day. This is 1 excludable day. From August 2, 2006 until August, 7, 2006, these are 6 includable days.

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August 8, 2006 is one excludable day for permit to bring guns into the court room.

August 9, 2006 and August 10, are two 2 includable days.

Based on the excessive 81 days, that are included, a violation under provisions of the speedy trial Act.

Therefore, the instant case must be dismissed pursuant to 18 U.S.C. 3162 (a)(2)

As to the defendants argument as to the multiple extentions delay from the first evaluation could add to the delay of the speedy trial clock.

Also this second evaluation is frivolous and merits no completion or proof of service. The ultimate question, is that I came back competent to stand trial. And this would add includable days to the allready violated speedy trial clock. The second evaluation would include 30 more days to the violated speedy trial act.

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Additional Delay That Should be Included.

It should be noted that there is additional time that should be included toward the speedy trial clock. This time is discussed here. Section 3161(h)(1)(A) excludes "delay resulting from any proceeding, including any examinations, to determine the mental competency of physical capacity of a defendant. See United States v Miranda 986 F2d 1283, 1284-85 affirming finding of 105 days of excludable delay under 3161(h)(1)(A) not withstanding a 45 day limit on competency examination under 18 U.S.C. § 4247(b) see also 3161(h)(4) (excluding any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

These 60 extra extentions days should be included to the speedy trial clock, due to the fact, that the defendant has come back competent to stand trial and the failure of the government to complete the 45 day limit of an evaluation. Along with 3 includable days for a late 30 day extention. March 17, 2006 instead of March 14, 2006.

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Additional Delay

Section 3161(h)(1)(H) presumptively limits excludable "delay resulting from transportation of any defendant.... to and from places of examination or hospitalization" to 10 days. See United States v. Castle 906 F 2d 134, 137-138 (5th Cir 1990) (only 10 of 20 days between order for psychiatric examination and defendant's arrival to MCC - Chicago are excludable and 10 day are includable. The U.S. marshalls Service act in bad faith and merely negligent) United States v. Jervey, 630 F Supp 695, 697 S.D. N.Y. 1986

Oridinary institutionalized delay is not a excuse. When this Act was passed, Congress knew all about the customs and practices of the prison Bus).

In the instant case, Mr. Tinklenberg had to be transported by the U.S. Marshalls Service to Chicago for the psychiatric examination. The period of time for the defendant to be transported is limited to 10 excludable days. Here the defendant was designated on November 10, 2005, The defendant did not arrive until November, 30, 2005. Therefore 10 days are excludable and 10 days are includable. in accordance § 3161(h)(1)(H)

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Dismissed With or Without Prejudice

A violation of the speedy Trial Act mandates the dismissal of the indictment, with or without prejudice. See 18 U.S.C. § 3162 (a)(2). In deciding whether to dismiss with or without prejudice, the district court must consider the general factors listed in 3162(a)(2). as well as prejudice to the defendant -- and neither has priority See. United States. v. Taylor 487 US. 326 (1988) see also United States v. Barnes 159 F3d 4, 16-18 (1st cir 1998) United States v. Belvins 142 F3d 223, 225-26 (5th cir 1998) United States v. Pierce 17 F3d 146, 148, 149 (6th cir 1994) United States v. Kottmyer 961 F2d 569, 572-73 (6th cir 1992)

The speedy trial act states that the court should consider these factors "among others" The listed factors include (1) the seriousness of the offense (2) the facts and circumstances of the case which led to the dismissal; and (3) the impact of a reprosecution on the administration of this chapter and on the administration of justice 18 U.S.C. § 3162(a)(2)

In the instant case, the government can make a claim that a felon in possession of a firearm is a serious matter.

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Dismissed with or without Prejudice continued

However the underlying facts of the instant case would demonstrate that the instant offense case arose after entraptment arising from a phone call to the police, by Loss Prevention Security Boe Bisette at Meijers on Gullroad. and an illegal stop and illegal search and seizure was performed.

This was not a case of using any firearms nor was there any drugs involved. other than .22 grams of leaves and stems. The defendant possessed legal items stipulated on a reciept from Meijer. This is an arguably serious charge but does not mandate to the defendant and should be dismissed with prejudice.

As to the impact that a re prosecution would have on the adminstration of justice, the defendant would argue that such prosecution would be a miscarriage of justice. The defendant believes that the lengthy delay has been contrary to his due process rights. Mr Tinklenberg has been incarcated over one year on these charges at this time. Therefore this case should be dismissed with prejudice.

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at this juncture.

Respectfully Submitted,

Jason Louis Tinklenberg,
Pro Se
1500 Lamont st.
Kalamazoo, MI, 49048

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Dec. 5, 2006

GOVERNMENT'S RESPONSE TO MOTION REGARDING SPEEDY TRIAL ACT

In his motion at docket number 112, the defendant raises the issue of whether there are Speedy Trial Act violations in his case. This issue was raised twice prior to trial by defendant's trial attorney in motions found at docket numbers 74 and 77. The Court denied both motions in orders found at docket numbers 79 and 81.

In the Court's order at docket number 79, there is a careful analysis of both the law and the computations of the passage of time in this case. In the Court's order at docket number 81, the Court denied the defendant's motion to reconsider this issue because "[m]otions for reconsideration that merely present the same issues ruled on by the court shall not be granted." W.D. Mich. L. Cr. R 47.3(a).

In this current motion, the defendant has not raised any new evidence or information regarding the Speedy Trial Act. This is an issue that the defendant can raise on appeal or in a 2255 motion after sentencing.

WHEREFORE, the motion should be denied.

Respectfully submitted,

MARGARET M. CHIARA
United States Attorney

/s/ JULIE ANN WOODS
JULIE ANN WOODS
Assistant United States Attorney
P.O. Box 208
Grand Rapids, Michigan 49501-0208
(616) 456-2404

Date: Dec. 4, 2006

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Dec. 11, 2006

ORDER

This matter is now before the Court on Defendant Jason Louis Tinklenberg's Motion for a *Ginther* Hearing, Motion to Set Aside the Verdict, Motion to Petition the Court of Habeas Corpus and Revocation, Motion for New Trial, Motion for Reconsideration of Order Denying Defendant's Motion to Dismiss as to a Violation of Defendant's Speedy Trial Act, and Second Motion for a New Trial. After review, the Court will deny all of Defendant's above listed Motions.

Regarding the Motion for a *Ginther* hearing, Defendant appears to argue that certain evidence should have been suppressed at his trial. However, Defendant did not make a motion to suppress during trial and, therefore, the argument is waived pursuant to Federal Rule of Criminal Procedure 12(b) & (c). To the extent Defendant is contesting the effectiveness of his trial counsel, such a motion is properly brought on appeal or under 28

U.S.C. § 2255, after Defendant has been sentenced. *See* 28 U.S.C. § 2255. As such this Motion will be denied.

Regarding Defendant's Motion to Set Aside the Verdict, Defendant challenges unspecified jury instructions which misdirected the jury. Defendant did not object to the jury instructions during the trial. To the extent Defendant appears to argue his counsel was ineffective for failing to object to the jury instructions, such an objection is premature. For these reasons, this Motion will be denied.

In Defendant's Motion to Petition the Court of Habeas Corpus and Revocation, Defendant alleges that he is being illegally held without bond. Defendant had not shown that there is a likelihood for acquittal or a new trial, nor any clear and convincing evidence that Defendant would not be a danger to the community if he was released. 18 U.S.C. § 3143(a)(1) & (2). To the extent Defendant moves for a writ of habeas corpus based on insufficiency of the evidence, such a motion is improper because it is premature.

Defendant filed two Motions seeking a new trial. The first Motion sets forth the same claims as Defendant's Motion which challenged the jury instructions. The Court will deny this Motion for the same reasons set forth above; Defendant does not specify what jury instructions were improper and such a Motion is properly brought on appeal or under section 2255, after sentencing.[1]

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[1] Defendant also alleges prosecutorial malice based on the withholding of a crucial witness. Defendant does not, however, identify the witness. Further the United States has indicated that no such request was ever made.

Defendant's second Motion for a New Trial is based on Defendant's claim that new evidence exists. However, Defendant's claim of new evidence is more accurately described as an argument that certain evidence should have been suppressed at trial. As noted previously, no motion to suppress was ever made. To the extent Defendant claims the call from a security guard at Meijer constituted entrapment, such a claim lacks a legal basis. *See United States v. Kahlil*, 279 F.3d 358, 364 (6th Cir. 2002) (setting forth the elements needed for a valid entrapment defense). Defendant also challenges the sufficiency of the evidence. Defendant's counsel previously made two Motions for Acquittal which challenged the sufficiency of the evidence. (Dkt. Nos. 86 & 87.) The Court denied these Motions on September 22, 2006, and found sufficient evidence for conviction.[2] (*See* Dkt. No. 95.) Defendant's second Motion for a New Trial does not cite any new evidence, nor allege a palpable defect such that Reconsideration of the Order would be appropriate. *See* W.D. MICH. LCrR 47.3(a). Finally, Defendant alleges a violation of the Speedy Trial Act as grounds for a new trial. Defendant's counsel previously filed a Motion regarding the alleged violation of the Speedy Trial Act. (Dkt. Nos. 74 & 79.) The Court denied that Motion and a subsequent Motion for Reconsideration. (Dkt. Nos. 77 & 81.) Defendant has alleged no new facts or evidence which would warrant Reconsid-

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[2] Defendant also alleges the use of improper jury instructions. The Court finds that this is improper for the same reasons articulated earlier in the Order.

eration of the issue. *See* W.D. MICH. LCRR 47.3(a). Therefore, the Court will deny this Motion.[3]

THEREFORE, IT IS HEREBY ORDERED that Defendant Jason Louis Tinklenberg's Motions (Dkt. Nos. 111, 112, 113, 114, 115 & 116) are **DENIED**.

/s/ RICHARD ALAN ENSLEN
RICHARD ALAN ENSLEN
SENIOR UNITED STATES
DISTRICT JUDGE

DATED in Kalamazoo, MI:
Dec. 11, 2006

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[3] Defendant's Motion to Dismiss as to Violation of Speedy Trial Act is denied on the same grounds. This motion is properly brought after sentencing on appeal or under § 2255.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Case Number. 1:05-CR-239
USM Number: 12507-040

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: Dec. 15, 2006

JUDGMENT IN A CRIMINAL CASE

The DEFENDANT was found guilty on Counts One, Two and Three after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offenses Ended	Count
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm	October 14, 2005	One
21 U.S.C. § 843(a)(6)	Unlawful Possession of Chemicals and Equipment Used to Manufacture Methamphetamine	October 14, 2005	Two

21 U.S.C. § 843(a)(6)	Unlawful Possession of Chemicals And Equipment Used to Manufacture Methamphetamine	October 14, 2005	Two

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Judgment:
Dec. 13, 2006

DATED in Kalamazoo, MI:
Dec. 15, 2006

/s/ RICHARD ALAN ENSLEN
RICHARD ALAN ENSLEN
SENIOR UNITED STATES JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **thirty-three (33) months** on each of Counts One, Two and Three, to be served concurrently.

■ The court makes the following recommendations to the Bureau of Prisons: Defendant be afforded appropriate mental health counseling and treatment and substance abuse treatment. Defendant be placed at an appropriate facility as close to Michigan as possible for family visitations.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district

- ☐ at__ a.m. /__ p.m. on __.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

- ☐ before 2 p.m. on __.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____Defendant delivered on _____

to _____

_____, with certified copy of this judgment.

_____

United States Marshal

By _____

Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three (3) years on each of Counts One, Two and Three, all such terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

■ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

■ The defendant shall cooperate in the collection of DNA as directed by the probation officer.

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer.

☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7. the defendant shall refrain from any use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendants criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall provide the probation officer with access to any requested financial information.

2. The defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer, and shall pay at least a portion of the cost according to his ability as determined, by the probation officer.

3. The defendant shall refrain from all use of alcoholic beverages.

4. The defendant shall participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer, and shall pay at least a portion of the cost according to his ability as determined by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS:	$300.00	$0	$2,348.42

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States.

Name of Payee	Total Loss	Restitution Ordered	Priority or Percentage
DEA Rick Finley Building 431 Howard St. Detroit, MI 48226	$2,348.42	$2,348.42	
TOTALS	$2,348.42	$2,348.42	

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

■ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

  ■ the interest requirement is waived for the ☐ fine ■ restitution.

  ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, put before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ■ Lump sum payment of $300.00 due immediately, balance due

- ☐ not later than _____, or
- ☐ in accordance with ■ C, ■ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ■ The unpaid balance shall be paid in minimum quarterly installments of $25.00 based on IFRP participation, or minimum monthly installments of $20.00 based on UNICOR earnings, during the period of incarceration, to commence 60 days after the date of this judgment

D ■ Payment in equal monthly installments of $50, to commence 30 days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within —(e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a

period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, 399 Federal Building, 110 Michigan, NW, Grand Rapids, Michigan 49503, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution,(6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Filed: June 2, 2008

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☐ admitted guilt to violation of Conditions(s) _____, of the term of supervision.

☒ was found in violation of Conditions of the term of supervision after denial of guilt.

Violation Number	**Nature of Violation**
One	Commission of a new crime
Two	Use of a controlled substance
Three	Use of a controlled substance

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has not violated condition(s) _____ and is discharged as to such viola tion(s) condition.

[ ] Violation _____ is/are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Judgment: May 30, 2008

/s/ PAUL L. MALONEY
PAUL L. MALONEY
United State District Judge

DATED: June 2, 2008

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **fourteen (14) months.**

☒ The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be confined to a medical facility able to address his mental health needs.

That the defendant receive a substance abuse evaluation and recommended treatment.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The Defendant shall surrender to the United States Marshal for this district on ____ at ____

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

- ☐ before 2:00 P.M. on _____
- ☐ as notified by the United States Marshal
- ☐ no later than _____
- ☐ no sooner than _____
- ☐ as notified by the Probation or Pretrial Services Office
- ☐ no later than _____
- ☐ no sooner than _____

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with certified copy of this judgment.

_____

United States Marshal

By: _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **twenty-two (22) months.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works or is a student, as directed by the probation officer.

☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;
7. the defendant shall refrain from any use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any para-

phernalia related to any controlled substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendants criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall provide the probation officer with access to any requested financial information.

2. The defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer, and shall pay at least a portion of the cost according to his/her ability as determined by the probation officer.

3. The defendant shall refrain from all use and/or possession of alcoholic beverages.

4. The defendant shall participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer, and shall pay at least a portion of the cost according to his/her ability as determined by the probation officer.

5. The defendant shall take all medication as prescribed and/or directed by a physician.

CRIMINAL MONETARY PENALTIES[1]

The defendant must pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth below.

Assessment	Fine	Restitution
$300.00($250.00 balance)	-0-	$2,348.42

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☒ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
DEA	$2,348.42	$2,348.42	

Rick Finley Building
431 Howard St.
Detroit, MI 48226

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[1] Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ Restitution amount ordered pursuant to plea agreement: $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The Court has determined that the defendant does not have the ability to pay interest, and it is ordered that:

- ☐ the interest requirement is waived for the fine.
- ☒ the interest requirement is waived for the restitution.
- ☐ the interest requirement for the fine is modified as follows:
- ☐ the interest requirement for the restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ Lump sum payment of $250.00 due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F, below; or

B ☐ Payment to begin immediately (may be combined with C, D, or F, below.)

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment, or

D ☐ Payment in equal _____ installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30, 60 or 90 days) after release from imprisonment to a term of supervision;

E ☐ Payment during term of supervised release will commence withing _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at the time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

The restitution and/or fine is to be paid in minimum quarterly installments of $25.00 based on IFRP participation, or minimum monthly installments of $20.00 based on UNICOR earnings, during the period of incarceration, to commence 60 days after the date of this judgment. Any balance due upon commencement of supervision shall be paid, during the term of supervision, in minimum monthly installments of $50.00 to commence 30 days after release from imprisonment.

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, 399 Federal Building, Grand Rapids, MI 49503, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

☐ The defendant shall forfeit those assets previously identified that are subject to forfeiture.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

PETITIONER'S BRIEF

No. 09-1498

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JASON LOUIS TINKLENBERG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the time between the filing of a pretrial motion and its disposition is automatically excluded from the deadline for commencing trial under the Speedy Trial Act of 1974, 18 U.S.C. 3161(h)(1)(D) (Supp. III 2009), or is instead excluded only if the motion causes a postponement, or the expectation of a postponement, of the trial.

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UNITED STATES OF AMERICA, PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 579 F.3d 589. The orders of the district court denying respondent's motion to dismiss the indictment (Pet. App. 29a-32a) and denying his motion to reconsider (Pet. App. 33a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2009. A petition for rehearing was denied on January 12, 2010 (Pet. App. 37a-38a). On March 31, 2010, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including May 12, 2010. On April 27, 2010, Justice Stevens further extended the time to June 11, 2010, and the petition was filed on June 8, 2010. The petition was granted on Sep-

tember 28, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-13a.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Michigan, respondent was convicted of possessing firearms after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1), and possessing materials used to manufacture methamphetamine, in violation of 21 U.S.C. 843(a)(6). Before trial, the district court denied respondent's motion to dismiss the indictment based on an alleged violation of the Speedy Trial Act of 1974 (STA or Act), 18 U.S.C. 3161 *et seq.* On appeal following respondent's conviction, the United States Court of Appeals for the Sixth Circuit reversed the district court's judgment and remanded with instructions to dismiss the indictment with prejudice. In finding an STA violation, the court of appeals rejected the interpretation that every other circuit has given 18 U.S.C. 3161(h)(1)(D), which excludes from the STA's deadline for commencing trial "delay resulting from any pretrial motion." Contrary to the long-standing and uniform view of the other circuits that the exclusion applies automatically to any pretrial motion, the court of appeals held that the exclusion applies only if a motion actually causes a postponement or the expectation of a postponement of the trial. Pet. App. 1a-28a.[1]

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[1] On October 13, 2008, after the district court's decision on the motion to dismiss but before the court of appeals' decision, Congress enacted the Judicial Administration and Technical Amendments Act of 2008,

1. The STA generally requires a defendant's trial to begin within 70 days of his indictment or his initial appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). To provide "sufficient flexibility" to make compliance with that deadline a realistic goal, the Act "automatically" excludes from the computation of the 70-day period certain "specific and recurring periods of time often found in criminal cases." S. Rep. No. 212, 96th Cong., 1st Sess 9 (1979); see *Bloate* v. *United States*, 130 S. Ct. 1345, 1351-1352 (2010). Among those exclusions is "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to" eight listed subcategories. 18 U.S.C. 3161(h)(1). Those subcategories include delays resulting from various frequent occurrences, such as proceedings to determine the defendant's mental competency or physical capacity, 18 U.S.C. 3161(h)(1)(A); trial on other charges against the defendant, 18 U.S.C. 3161(h)(1)(B); interlocutory appeals, 18 U.S.C. 3161(h)(1)(C); proceedings to transfer the case or to remove the defendant from another district, 18 U.S.C. 3161(h)(1)(E); transportation of the defendant from another district or to or from places of examination and hospitalization, 18 U.S.C. 3161(h)(1)(F); and consideration of a proposed plea agreement, 18 U.S.C. 3161(h)(1)(G); as well as up to 30 days of delay attributable to any period during which any proceeding concern-

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Pub. L. No. 110-406, § 13, 122 Stat. 4294, which made technical changes to the STA. As relevant here, Congress renumbered the exclusion for pretrial motions delay, which had previously been designated as 18 U.S.C. 3161(h)(1)(F), as 18 U.S.C. 3161(h)(1)(D). Except where noted, all citations in this brief refer to the current version of the STA as codified in the 2006 edition of the United States Code and the 2009 Supplement.

ing the defendant is under advisement by the court, 18 U.S.C. 3161(h)(1)(H). One of the subcategories is the exclusion at issue in this case: "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(D).

The Act also automatically excludes several other frequently recurring periods, 18 U.S.C. 3161(h)(2)-(5), including, for example, any period of delay resulting from the absence or unavailability of the defendant or an essential witness, 18 U.S.C. 3161(h)(3)(A), or from the defendant's mental incompetence or physical inability to stand trial, 18 U.S.C. 3161(h)(4). See *Henderson* v. *United States*, 476 U.S. 321, 327 (1986).

In addition, the STA contains several exclusions that apply "only if the district court makes certain findings enumerated in the statute." *Bloate*, 130 S. Ct. at 1351; see 18 U.S.C. 3161(h)(6)-(8). For example, the Act authorizes district court judges to exclude from the 70-day limit "[a]ny period of delay resulting from a continuance * * * if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161(h)(7)(A).

If the defendant is not brought to trial within the 70-day period, "the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). Dismissal may be with or without prejudice, depending on the district court's weighing of various factors. *Ibid.*; see *United States* v. *Taylor*, 487 U.S. 326, 336-337, 342-343 (1988).

2. On January 14, 2005, a security guard at a Meijer store in Kalamazoo County, Michigan, notified the local

police that respondent had purchased materials commonly used to cook methamphetamine. The guard also provided a description of the camper that respondent was driving. Tr. 310-313; Dep. Tr. 6-7, 29-30.[2] Shortly thereafter, a police officer saw respondent driving the camper, which had an open rear door and an expired registration tag. The officer followed the camper into a parking lot, where respondent got out of the vehicle. Tr. 184-189; Dep. Tr. 11-12. Respondent consented to a pat-down, during which the officer recovered a knife and three Meijer receipts. Tr. 190-191, 194-196; Dep. Tr. 32. Another officer continued the pat-down and found a loaded magazine for a .22 caliber pistol in respondent's pocket. Respondent told the officers that the pistol was next to the driver's seat of the camper, and the officers found the pistol there. Tr. 191-194; Dep. Tr. 12-15, 32.

The officers searched the camper and found a plastic bag containing over 900 nasal decongestant tablets, as well as other materials commonly used to manufacture methamphetamine. Tr. 196-197, 270, 331-345, 349-354; Dep. Tr. 15-17. Respondent also consented to a search of his residence, where officers found a shotgun. Dep. Tr. 22-23. Several months later, in October 2005, police officers searched respondent's residence again pursuant to a warrant, and they found additional materials used to manufacture methamphetamine. Tr. 207, 210-211, 223-240, 255, 263, 269-270, 274-279, 285-289, 354-357.

3. On October 20, 2005, a grand jury in the Western District of Michigan indicted respondent on charges of possessing firearms after having been convicted of a

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[2] "Tr." refers to the trial transcript. "Dep. Tr." refers to the transcript of the video deposition of Joshua Howk, one of the police officers who arrested respondent. Howk was deposed because he was unavailable to testify at trial. See Fed. R. Crim. P. 15; pp. 6-7, *infra*.

felony, in violation of 18 U.S.C. 922(g)(1), and possessing materials used to manufacture methamphetamine, in violation of 21 U.S.C. 843(a). J.A. 6 (Docket entry No. 1); J.A. 96-99.[3] On October 31, 2005, respondent made his initial appearance before a judicial officer. J.A. 8-9 (Docket entry No. 10). That event started the speedy trial clock. See 18 U.S.C. 3161(c)(1); Pet. App. 7a-9a.

Two days later, on November 2, 2005, a magistrate judge granted respondent's request for a mental competency examination. J.A. 9-10 (Docket entry Nos. 12, 14). Respondent was subsequently transported from Grand Rapids, Michigan, to the Metropolitan Correction Center in Chicago, Illinois, for the examination. Pet. App. 2a. On March 23, 2006, based on the results of the examination, the magistrate judge issued an order finding respondent competent to stand trial. J.A. 15 (Docket entry No. 28). On March 29, 2006, respondent requested a second, independent competency evaluation, and the magistrate judge subsequently granted that request. J.A. 17 (Docket entry Nos. 34-36). On June 9, 2006, the magistrate judge again found respondent competent to stand trial. Pet. App. 4a. On July 25, 2006, the district court set a trial date of August 14, 2006. J.A. 25 (Docket entry No. 58); J.A. 134.

Between July 25 and August 14, 2006, the parties filed, and the district court resolved, three pretrial motions. On August 1, the government filed a motion seeking permission to conduct a video deposition of a witness who was scheduled to be out of the country at the time of trial. J.A. 26 (Docket entry No. 60); J.A. 139-140. On August 3, the district court granted the motion, but or-

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[3] All references to docket entries are to entries in the record of the proceedings in the district court.

dered that "[t]he parties shall schedule [the] deposition posthaste, so as not to delay trial." J.A. 145; see J.A. 27 (Docket entry No. 65). On August 8, the government requested permission to bring the firearms possessed by respondent into the courtroom as evidence at the trial. J.A. 28 (Docket entry No. 70); J.A. 147-148. On August 10, the district court granted that motion. J.A. 29 (Docket entry No. 73); J.A. 149. On August 11, respondent filed a motion to dismiss the indictment for a violation of the STA's 70-day time limit for commencing trial. J.A. 29 (Docket entry No. 74); J.A. 150-187. On August 14, the district court denied the motion. J.A. 30 (Docket entry No. 77); Pet. App. 29a-32a; see Tr. 2-23.

Respondent's trial began that same day, August 14, 2006. J.A. 30 (Docket entry No. 78). The next day, respondent filed a motion for reconsideration of the order denying his motion to dismiss on speedy trial grounds. *Ibid.* (Docket entry No. 79); J.A. 194-198. The district court denied the motion. J.A. 31 (Docket entry No. 81); Pet. App. 33a-36a; see Tr. 296.

Respondent's trial concluded on August 16, 2006, with the jury finding respondent guilty of all charges. J.A. 31 (Docket entry No. 82); Tr. 435-436. On December 13, 2006, the district court sentenced respondent to 33 months of imprisonment, to be followed by three years of supervised release. J.A. 47 (Docket entry No. 133); Pet. App. 5a.[4]

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[4] On April 21, 2008, while respondent's appeal of his conviction was pending, he was released from prison and began his supervised release. Pet. App. 5a. On May 30, 2008, the district court found that respondent had violated the terms of his supervised release and sentenced him to an additional 14 months in prison, to be followed by 22 months of supervised release. Pet. App. 5a-6a; J.A. 246-258.

4. The court of appeals reversed the district court's STA ruling and remanded with instructions to dismiss the indictment with prejudice. Based on its calculations, the court of appeals concluded that respondent's trial began three days after the STA's 70-day time limit had expired. Pet. App. 1a-28a.

The court of appeals found that the speedy trial clock began to run on October 31, 2005, the date of respondent's initial appearance, Pet. App. 7a-9a, and ruled that the days on which a pretrial motion is filed and resolved are excluded from the speedy trial calculation, *id.* at 9a-11a. The court further ruled that the periods consumed by respondent's two mental competency examinations were generally excludable under Section 3161(h)(1)(A), except that two of the 12 business days that it took to transport respondent to the first examination were not excludable under Section 3161(h)(1)(F), which provides that any transportation time in excess of ten days shall be presumed to be unreasonable. Pet. App. 11a-15a. Accordingly, the court of appeals determined that only 60 non-excludable days had elapsed as of July 31, 2006. *Id.* at 15a.

The court of appeals held, however, that the nine days spent resolving pretrial motions filed between August 1, 2006, and the start of trial on August 14, 2006, were not excludable under Section 3161(h)(1)(D). Pet. App. 15a-20a. The court noted that "[e]very circuit to have addressed the issue appears to have held the filing of any pretrial motion stops the Speedy Trial clock, regardless of whether the motion has any impact on the trial's start date." *Id.* at 16a (citing cases). "[D]isagree[ing]" with that "consensus," however, the court held that "a pretrial motion must actually cause a delay, or the expectation of a delay, of trial in order to create

excludable time." *Ibid.* In the court's view, because Section 3161(h)(1)(D) repeatedly refers to "delay resulting from" pretrial motions, "[t]here is no conceivable way to read [the statute] other than to require a delay to *result* from any pretrial motion before excludable time occurs." *Id.* at 17a. Rejecting the view of the other circuits that the statutory text, the STA's legislative history, and this Court's cases all indicate that the exclusion applies automatically whenever a pretrial motion is filed, the court of appeals stated that it would "remain faithful to" its own reading of "the statutory language and interpret [Section 3161(h)(1)(D)] as excluding the time in which pretrial motions are filed and pending only if they could possibly cause any delay of the trial." *Id.* at 19a. Because the district court did not postpone respondent's scheduled trial date after the filing of the three pretrial motions, and the court of appeals found no indication that the motions "threatened to delay the trial," the court of appeals concluded that the time consumed in resolving the motions was not excluded under Section 3161(h)(1)(D). *Id.* at 19a-20a.[5]

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[6] In his brief in the court of appeals, respondent did not argue that the pretrial motion exclusion applies only if the motion at issue delayed or threatened to delay the trial. See Resp. C.A. Br. 7-12; Pet. App. 26a. Nor did respondent make that argument in either his motion to dismiss or his motion for reconsideration in the district court. See J.A. 150-160, 194-198; Pet. App. 26a-27a. Indeed, in his motion for reconsideration, respondent accepted that the August motions created excludable time and disagreed only about the amount of that time. See J.A. 195-197; Pet. App. 27a. Nonetheless, the court of appeals concluded that because respondent "unquestionably asked both [it] and the [district court] to count the number of days that had lapsed for the purposes of the Speedy Trial Act," he had "adequately preserved the overarching issue." *Id.* at 20a n.4. The government did not seek this Court's review of that case-specific ruling.

Based on that holding, the court of appeals concluded that 73 non-excludable days elapsed before respondent's trial began and therefore that the trial commenced three days after the expiration of the STA's deadline. Pet. App. 20a. Rather than remand the case to the district court for that court to make a determination under 18 U.S.C. 3162(a)(2) whether to dismiss the indictment with or without prejudice, the court of appeals itself conducted that analysis and remanded with instructions to dismiss the indictment with prejudice. Pet. App. 21a-22a. The court acknowledged that "the seriousness of the offense" and "the facts and circumstances" that "led to the dismissal," 18 U.S.C. 3162(a)(2), "point[ed] to dismissal without prejudice." Pet. App. 21a. Nonetheless, the court concluded that dismissal with prejudice was required because respondent had already completed his term of imprisonment. *Id.* at 21a-22a.[6]

Judge Gibbons concurred. Pet. App. 23a-28a. She disagreed with the majority's calculation of the excludable delay related to respondent's transportation to the first competency examination. *Id.* at 23a-26a. Judge Gibbons also believed that respondent had not properly preserved a claim that the three pretrial motions resolved in August did not result in excludable delay, *id.* at 26a-27a; see note 5, *supra*, but she agreed with the

[6] Respondent was released from prison on May 15, 2009. See Federal Bureau of Prisons, *Inmate Locator* (visited Nov. 30, 2010), http://www.bop.gov/iloc2/LocateInmate.jsp. As of September 3, 2009, the date that the court of appeals issued its opinion, respondent still had approximately 18 months of his 22-month term of supervised release left to serve. Based on the court of appeals' decision, however, the district court immediately discharged respondent from supervised release. J.A. 91 (Docket entry No. 256). Accordingly, respondent still is subject to a term of supervised release that could be reinstated if this Court reverses the court of appeals' judgment.

majority's reading of Section 3161(h)(1)(D) as a matter of statutory interpretation, and she agreed that dismissal with prejudice was warranted. Pet. App. 27a-28a.

SUMMARY OF ARGUMENT

Ever since the STA was enacted three dozen years ago, the courts of appeals have uniformly held that the pretrial motion exclusion applies automatically upon the filing of any motion, regardless of the motion's effect on the trial schedule, until the decision below. The court below departed from that well-established approach by holding that the exclusion applies only if a motion causes a postponement or the expectation of a postponement of the trial. That holding cannot be squared with the language of 18 U.S.C. 3161(h)(1)(D), this Court's cases, or the STA's structure, legislative history, and purposes.

A. Section 3161(h)(1)(D) excludes from the STA's 70-day time limit for commencing trial "[a]ny period" of "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." "The plain terms of the statute" thus "exclude all time between the filing of and the hearing on a motion" without further factual inquiry. *Henderson* v. *United States*, 476 U.S. 321, 326 (1986). The court below rejected that interpretation of the statute because the court assumed that the phrase "delay resulting from" refers to postponement of the trial. But Section 3161(h)(1)(D) does not refer to delay of the trial or a continuance of the trial date. And the surrounding text makes clear that the "delay" to which Section 3161(h)(1)(D) refers is not postponement of the trial. The text specifies that the "delay" begins with "the filing of the motion" and ends with "the hearing on" or other "disposition" of the mo-

tion—starting and stopping points that bear no necessary relation to the time during which trial might be postponed as the result of a motion. The statutory context thus establishes that the "delay resulting from" a motion is not the time during which trial might be postponed but is instead the interval of time between the filing of the motion and its disposition "during which the speedy trial clock [is] stopped and the expiration of the 70-day period is thereby postponed." *United States* v. *Green*, 508 F.3d 195, 200 (5th Cir. 2007) (citation omitted), cert. denied, 553 U.S. 1080 (2008).

B. This Court's cases confirm that interpretation of the statute. The Court has construed the pretrial motion exclusion in two cases—*Henderson* and *Bloate* v. *United States*, 130 S. Ct. 1345 (2010). Both cases make clear that Section 3161(h)(1)(D) is an "automatic" exclusion that applies "regardless of the specifics of the case" and "without district court findings." *Id.* at 1349 n.1, 1351; *Henderson*, 476 U.S. at 327. In *Bloate*, the Court stressed that Section 3161(h)(1)(D) "renders automatically excludable * * * delay that occurs '*from the filing* of the motion through the conclusion of the hearing on, or other prompt disposition of,' the motion." 130 S. Ct. at 1353. In *Henderson*, the Court held that the time consumed in resolving the pretrial motions at issue was "automatically excludable," without considering whether the district court had rescheduled the trial date in response to the motions or whether the motions otherwise caused the postponement, or the expectation of any postponement, of the trial. 476 U.S. at 331-332.

C. The statutory structure also indicates that the applicability of the pretrial motion exclusion does not turn on a finding that the motion could have affected the trial schedule. The STA's exclusions fall into two cate-

gories. One category includes automatic exclusions, such as the pretrial motion exclusion and the other exclusions for "proceedings concerning the defendant" in 18 U.S.C. 3161(h)(1). The other category includes exclusions, such as the one in 18 U.S.C. 3161(h)(7) for continuances that serve the ends of justice, which apply "only if the district court makes certain findings enumerated in the statute." *Bloate*, 130 S. Ct. at 1351. The ruling of the court below that a pretrial motion triggers excludable time only if it caused an actual or expected postponement of the trial is inconsistent with that statutory structure, because the ruling makes the pretrial motion exclusion contingent on additional case-specific findings beyond the fact that a motion has been filed.

D. The interpretation of the exclusion adopted by the court below is also inconsistent with the STA's legislative history. The legislative record surrounding both the STA's original enactment in 1974 and its amendment in 1979 makes clear that Congress used the phrase "delay resulting from" to refer to the time consumed by a proceeding or an event that triggers an exclusion, not the time during which trial might be postponed. And the legislative history also establishes that Congress intended the exclusions in Section 3161(h)(1) for delays resulting from proceedings concerning the defendant, including pretrial motions, to apply automatically whenever a proceeding is pending, with no need for additional findings.

E. Automatically excluding the time between the filing of any pretrial motion and its disposition also furthers the STA's purposes. For the STA to operate efficiently and practicably, the district court and the parties must be able to know, as each day passes, whether that day counts towards the STA's deadline for commencing

trial. The established understanding of the pretrial motion exclusion comports with that practical necessity by providing a clear rule that the speedy clock stops whenever any pretrial motion is filed. This established approach thus both facilitates compliance with the Act and advances the Act's goals of providing speedy trials without sacrificing the time needed to resolve important pretrial proceedings.

The court of appeals' rule, in contrast, is not consonant with the STA's purposes. The court's opinion does not make clear if excludability turns on a fact-specific determination whether a particular motion actually caused a postponement or the expectation of a postponement of the trial or turns instead on whether the trial court formally moved the trial date in response to the motion. If a motion-specific causation determination is required, district courts and the parties will not be able to know at the time that a motion is filed whether the motion tolls the speedy trial clock, and courts are likely to become embroiled in complex collateral disputes over causation that add to, rather than reduce, pretrial delay. If excludability instead depends on the formality of whether the district court moves the trial date, the applicability of the exclusion will turn on arbitrary facts that bear no relation to the Act's purposes, such as whether or not the district court accounted for the time needed to resolve motions when it set the initial trial date. The STA's goal of providing a clear and administrable timetable for commencing criminal trials can be achieved only if this Court rejects the ruling of the court below and holds that the exclusion in Section 3161(h)(1)(D) applies automatically once any pretrial motion is filed, without regard to whether the motion affected or could have affected the trial schedule.

ARGUMENT

THE TIME BETWEEN THE FILING OF ANY PRETRIAL MOTION AND ITS DISPOSITION IS AUTOMATICALLY EXCLUDED FROM THE SPEEDY TRIAL ACT'S DEADLINE FOR COMMENCING TRIAL, WITHOUT A FINDING THAT THE MOTION AFFECTED THE TRIAL SCHEDULE

In 18 U.S.C. 3161(h), the Speedy Trial Act excludes various specified periods of delay from the computation of the 70-day limit for commencing trial. Some of those periods are excludable only if the district court makes findings delineated by the Act, while others are "automatically excludable." *Bloate* v. *United States*, 130 S. Ct. 1345, 1351 (2010). At issue in this case is 18 U.S.C. 3161(h)(1)(D), which excludes "[a]ny period of delay resulting from other proceedings concerning the defendant, including * * * delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion."

This Court has construed that pretrial motion exclusion in two cases—*Bloate* and *Henderson* v. *United States*, 476 U.S. 321 (1986). In both cases, the Court made clear that Section 3161(h)(1)(D), like the other exclusions for "proceedings concerning the defendant" in Section 3161(h)(1), is an "automatic" exclusion, applicable "regardless of the specifics of the case" and "without district court findings." *Bloate*, 130 S. Ct. at 1349 n.1, 1351; *Henderson*, 476 U.S. at 327. And, in *Henderson*, the Court held that Section 3161(h)(1)(D) excludes "all time between the filing of a motion" and the point at which the court is "in a position to dispose of a motion." *Id.* at 330-331.

Consistent with those decisions, ever since the STA's enactment, the courts of appeals had uniformly held that the filing of any pretrial motion automatically stops the speedy trial clock, regardless of whether the motion had any impact on the trial's start date.[7] In this case, the Sixth Circuit broke with that longstanding consensus and held that "a pretrial motion must actually cause a delay, or the expectation of a delay, of trial in order to create excludable time." Pet. App. 16a. That holding is inconsistent with the language of the pretrial motion exclusion, this Court's cases, the STA's structure, the STA's legislative history, and practical and policy considerations underlying the Act.

A. The Text Of Section 3161(h)(1)(D) Automatically Excludes The Period From The Filing Of Any Pretrial Motion Through Its Disposition

1. Section 3161(h)(1)(D) excludes from the STA's time limit for commencing trial "[a]ny period" of "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C.

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[7] See, *e.g.*, *United States* v. *Wilson*, 835 F.2d 1440, 1443 (D.C. Cir. 1987), abrogated on other grounds by *Bloate*, *supra*; *United States* v. *Hood*, 469 F.3d 7, 10 (1st Cir. 2006); *United States* v. *Cobb*, 697 F.2d 38, 42 (2d Cir. 1982), abrogated on other grounds by *Henderson*, *supra*; *United States* v. *Arbelaez*, 7 F.3d 344, 347 (3d Cir. 1993); *United States* v. *Dorlouis*, 107 F.3d 248, 253-254 (4th Cir.), cert. denied, 521 U.S. 1126 (1997); *United States* v. *Green*, 508 F.3d 195, 200 (5th Cir. 2007), cert. denied, 553 U.S. 1080 (2008); *United States* v. *Montoya*, 827 F.2d 143, 151 (7th Cir. 1987); *United States* v. *Titlbach*, 339 F.3d 692, 698 (8th Cir. 2003); *United States* v. *Vo*, 413 F.3d 1010, 1015 (9th Cir.), cert. denied, 546 U.S. 1053 (2005); *United States* v. *Vogl*, 374 F.3d 976, 985 (10th Cir. 2004); *United States* v. *Miles*, 290 F.3d 1341, 1350 (11th Cir.), cert. denied, 537 U.S. 1089 (2002).

3161(h)(1)(D). Thus, as this Court observed in *Henderson*, "[t]he plain terms of the statute appear to exclude all time between the filing of and the hearing on a motion" without further factual inquiry or findings. 476 U.S. at 326.

As numerous courts of appeals have concluded, in the context of Section 3161(h), the phrase "delay resulting from" refers to the interval of time during which the STA's deadline for commencing trial is postponed because of a specified proceeding or event. See *United States* v. *Green*, 508 F.3d 195, 200 (5th Cir. 2007), cert. denied, 553 U.S. 1080 (2008); *United States* v. *Vogl*, 374 F.3d 976, 986 (10th Cir. 2004); *United States* v. *Montoya*, 827 F.2d 143, 151 (7th Cir. 1987); *United States* v. *Cobb*, 697 F.2d 38, 42 (2d Cir. 1982), abrogated on other grounds by *Henderson, supra*. That interpretation accords with one common meaning of the word "delay," which is "[t]he interval of time between two events," such as the stopping and restarting of the speedy trial clock. *The American Heritage Dictionary of the English Language* 480 (4th ed. 2006) (*American Heritage Dictionary*); see *Webster's Third New International Dictionary of the English Language* 595 (1971) (defining "delay" as "the time during which something is delayed"). It also accords with the ordinary meaning of the phrase "resulting from," which is "as a consequence." See *Bloate*, 130 S. Ct. at 1353 n.9; *id.* at 1361 (Alito, J., dissenting) (quoting *Webster's Third* 1937); *American Heritage Dictionary* 1487.

The remaining language of Section 3161(h)(1)(D) precisely defines the starting and ending points of the excludable "delay resulting from" a pretrial motion—"the filing of the motion" and "the conclusion of the hearing on, or other prompt disposition of," the motion.

18 U.S.C. 3161(h)(1)(D). Thus, the excludable "delay resulting from" a pretrial motion is the "period of time" between the filing of the motion and its disposition "during which the speedy trial clock [is] stopped and the expiration of the 70-day period thereby postponed." *Cobb*, 697 F.2d at 42. And the statute excludes that period of time for "*any* pretrial motion," 18 U.S.C. 3161(h)(1)(D) (emphasis added), "regardless of its type or its actual effect on the trial," *United States* v. *Hood*, 469 F.3d 7, 10 (1st Cir. 2006).

2. The court below rejected that interpretation of Section 3161(h)(1)(D), which has been adopted by every other court of appeals, because it assumed that the phrase "delay resulting from" necessarily refers to a postponement of the commencement of the trial. Contrary to that assumption, however, neither Section 3161(h)(1)(D), nor Section 3161(h) more generally, mentions delay of the trial or a continuance of the trial date. Moreover, the other language in Section 3161(h)(1)(D) makes clear that the "delay" to which the provision refers is not postponement of the trial. The text indicates that the "delay" begins with "the filing of the motion" and ends with "the hearing on" or other "disposition" of the motion, but those starting and stopping points bear no necessary relation to the time during which trial might be postponed as the result of a motion. For example, a defendant might file a motion to exclude certain evidence 14 days before trial is scheduled to begin. If the briefing and the hearing on the motion take 16 days to complete, the trial may be postponed for only two days. Yet Section 3161(h)(1)(D) defines the excludable "delay" as the entire 16 days during which the motion was pending. Similarly, a defendant might file a motion to depose a witness who is hospitalized and is not ex-

pected to be well enough to appear at trial, which is scheduled to begin in a week. If the judge grants the motion the same day that it is filed, but the patient's medical condition makes it impossible for the deposition to occur for two weeks, Section 3161(h)(1)(D) provides for only one day of excludable "delay," even though the trial must be postponed for at least a week.

Furthermore, even if the term "delay" in Section 3161(h)(1)(D) meant postponement of the trial, the statutory language would still not support the court of appeals' interpretation of the pretrial motion exclusion. The court held that the exclusion applies not only when a motion "actually cause[s]" a delay of the trial but also whenever a motion causes "the expectation of a delay." Pet. App. 16a; see *id.* at 19a ("interpret[ing] [Section] 3161(h)(1)(D) as excluding the time in which pretrial motions are filed and pending only if they could possibly cause any delay of the trial"); *ibid.* (noting that the motions at issue in this case neither "caused any delay of the trial" nor "threatened to delay the trial"). But if the term "delay" in Section 3161(h)(1)(D) truly referred to postponement of the trial, then nothing in the statute would permit the application of the exclusion when a postponement did not actually occur but was only "expect[ed]," "possibl[e]," or "threatened."

In his brief in opposition to the petition for a writ of certiorari, respondent asserted that the court of appeals actually held only that the pretrial motion exclusion does not apply "[i]f the parties know from the moment that pretrial motions are filed that they will not affect the scheduled trial date." Br. in Opp. 6. As the government explained in its reply brief, that is not how the court of appeals described the rule that it adopted, nor

could that be what the court held. Gov't Cert. Reply 3.[8] In any event, respondent's reinterpretation of the court's holding is also unsupported by the statutory text. The exclusion applies to "*any* pretrial motion," 18 U.S.C. 3161(h)(1)(D) (emphasis added), not "*any* pretrial motion *except* a motion that the parties know will not affect the scheduled trial date."

B. This Court's Cases Establish That The Pretrial Motion Exclusion Applies Automatically Once A Motion Is Filed And Is Not Contingent On Additional Findings

The court of appeals' novel interpretation of the pretrial motion exclusion is also inconsistent with this Court's decisions. Those decisions instead support the settled view of the other courts of appeals that the exclusion applies automatically upon the filing of any pretrial motion, without the need for a finding that the motion affected or could have affected the trial schedule.

1. In *Henderson*, this Court granted review to resolve a conflict among the courts of appeals over whether Section 3161(h)(1)(D) excludes delay from a pretrial motion only if the delay was "reasonably necessary." 476 U.S. at 325 n.6. The Court rejected a reasonableness requirement, holding instead that "Congress intended [Section 3161(h)(1)(D)] to exclude from the

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[8] At the time the motions in this case were filed, the parties could not have been certain how long the district court would need to resolve the legal issues presented and whether the court's consideration of those issues would require postponement of the scheduled trial date. In addition, one motion involved a request to depose a witness. Although the district court directed the parties to schedule the "deposition posthaste so as not to delay trial," J.A. 145, neither the parties nor the court could have been certain that events beyond their control (such as the unexpected unavailability of the witness) would not delay the deposition and require postponement of the trial.

[STA's] 70-day limitation all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary.'" *Id.* at 330.

In reaching that holding, the Court explained that the pretrial motion exclusion is "intended to be automatic." *Henderson*, 476 U.S. at 327 (citation omitted). The Court repeatedly observed that the plain terms of the exclusion "exclude all time between the filing of and the hearing on a motion" without qualification. *Id.* at 326; see *id.* at 329. And the Court concluded that Section 3161(h)(1)(D) is "designed to exclude all time that is consumed in placing the trial court in a position to dispose of a motion." *Id.* at 331.

Applying its interpretation of Section 3161(h)(1)(D), the Court in *Henderson* held that the time consumed in resolving the pretrial motions at issue was "automatically excludable," without considering whether the motions caused postponement, or the expectation of any postponement, of the trial. 476 U.S. at 331-332. The Court did not discuss whether a trial date had been set before the motions were filed or whether the district court had rescheduled the trial to accommodate the motions. Thus, the Court's application of Section 3161(h)(1)(D) in *Henderson* indicates that time consumed in resolving a pretrial motion is automatically excluded regardless of whether the motion causes or threatens a postponement of the trial.[9]

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[9] In fact, the record in *Henderson* indicates that the initially scheduled trial date had passed six weeks before the first of the motions at issue was filed, and the district court therefore concluded that the trial date had been "vacated" "by inference." J.A. at 25, *Henderson*, *supra* (No. 84-1744). The court did not set a new trial date until after the motions were resolved. See *id.* at 25-32.

Indeed, in light of *Henderson*'s holding that Congress did not restrict the pretrial motion exclusion to "reasonably necessary" delay, it would make little sense to conclude that Congress limited the exclusion to motions that cause or threaten postponement of the trial. That limitation would not ensure that trials occur more expeditiously, because, under *Henderson*, the STA deadline would be extended whenever a court put off trial in response to a motion, even if the postponement was unnecessary to resolve the motion.

Moreover, the practical reasons for rejecting a requirement that time excluded based on a pretrial motion be reasonably necessary also counsel against a limitation that time may be excluded only if a motion causes or threatens postponement of the trial. As the court of appeals in *Henderson* explained, it would be unworkable to require that delay based on the pretrial motion exclusion be reasonably necessary: In order to ensure compliance with the STA's deadlines, the court and the parties must know definitively when the speedy trial clock has stopped and when it has restarted. If time is excludable only when reasonably necessary, however, neither the court nor the parties could be certain of the date on which delay was no longer reasonable and the speedy trial clock had therefore restarted. *United States* v. *Henderson*, 746 F.2d 619, 623 (9th Cir. 1984), aff'd, 476 U.S. 321 (1986). A rule that the pretrial motion exclusion applies only to motions that cause or threaten postponement of the trial would be similarly unworkable, because the parties could not be certain at the time that a motion was filed whether it would meet that standard, and they therefore would not know whether the speedy trial clock had stopped. See pp. 36-38, *infra*.

2. Last Term, in *Bloate*, this Court reiterated its conclusion in *Henderson* that the pretrial motion exclusion is "automatic." *Bloate*, 130 S. Ct. at 1349 n.1; see *id.* at 1351-1353. And the Court explained that such automatic exclusions apply "regardless of the specifics of the case," *id.* at 1349 n.1, and "without district court findings," *id.* at 1351.

The Court held in *Bloate* that time granted to a party to prepare pretrial motions is not automatically excluded by Section 3161(h)(1)(D) but instead may be excluded only if a district court makes case-specific findings to justify an ends-of-justice continuance under 18 U.S.C. 3161(h)(7). 130 S. Ct. at 1351-1353. The Court reasoned that Section 3161(h)(1)(D) "does not subject all pretrial motion-related delay to automatic exclusion" but "renders automatically excludable only the delay that occurs '*from the filing* of the motion through the conclusion of the hearing on, or other prompt disposition of,' the motion." *Id.* at 1353. The Court concluded that Section 3161(h)(1)(D) "communicates Congress' judgment that delay resulting from pretrial motions is automatically excludable, *i.e.* excludable without district court findings, *only* from the time a motion is filed through the hearing on or disposition point specified." *Ibid.* Thus, *Bloate* indicates that Section 3161(h)(1)(D) automatically excludes the time between the filing of any pretrial motion and its disposition without the need for additional findings.

Bloate also undermines the view of the court below that a proceeding results in "delay" only when it causes or threatens postponement of the trial. Although this Court concluded in *Bloate* that the delay resulting from the defendant's request for additional motions preparation time was not excluded under Section 3161(h)(1)(D)

because that delay occurred before any motion was filed, both the Court and the dissent agreed that the request had resulted in "delay." See 130 S. Ct. at 1352-1353; *id.* at 1360 (dissenting opinion). Furthermore, the Court understood the "delay at issue" to be the additional time allotted for motions preparation, not any actual or threatened postponement of the trial. See *id.* at 1352. Indeed, nothing in the record indicated that the additional preparation time threatened to postpone the trial, and the district court did not move the trial date when it granted the request for additional time. Docket entry No. 20, *United States* v. *Bloate*, 4:06-cr-00518-SNL, 2007 WL 551740 (E.D. Mo. Feb. 21, 2007). Thus, *Bloate*, like *Henderson*, strongly suggests that the court below erred in holding that a pretrial motion creates "delay" only if the motion causes postponement or the expectation of postponement of the trial.

C. The STA's Structure Indicates That The Pretrial Motion Exclusion Applies Automatically Regardless Of Whether The Motion Caused Or Might Have Caused Postponement Of The Trial

The structure of the STA also supports the established rule that the pretrial motion exclusion is not contingent on a finding that the motion could have affected the trial schedule. As this Court recognized in *Bloate*, the STA's exclusions fall into two distinct categories. One category of exclusions applies "only if the district court makes certain findings enumerated in the statute." *Bloate*, 130 S. Ct. at 1351. Most prominent among those exclusions is Section 3161(h)(7), which excludes delay resulting from a continuance when the trial court finds that the ends of justice served by granting the continuance outweigh the interests of society and the defendant

in a speedy trial. *See id.* at 1355. Another category of exclusions is automatic and applies "without district court findings." *Id.* at 1351. That category includes, for example, the exclusions in 18 U.S.C. 3161(h)(1) for delays resulting from "other proceedings concerning the defendant" and the exclusion in 18 U.S.C. 3161(h)(3)(A) for delay resulting from the unavailability of the defendant. See *ibid.*; *Henderson*, 476 U.S. at 327.

Congress distinguished between the two categories of exclusions for a reason. The automatic exclusions identify "specific and recurring periods of time often found in criminal cases," S. Rep. No. 212, 96th Cong., 1st Sess. 9 (1979) (*1979 Senate Report*), that are excluded from the speedy trial deadline to "permit normal pretrial preparation in the ordinary noncomplex cases which represent the bulk of business in the Federal courts," S. Rep. No. 1021, 93d Cong., 2d Sess 21 (1974) (*1974 Senate Report*); see H.R. Rep. No. 1508, 93d Cong., 2d Sess. 8, 15, 21 (1974) (*1974 House Report*). The other exclusions, particularly Section 3161(h)(7), provide flexibility to address less common situations in which Congress was not certain that the balance of interests would routinely justify extending the STA deadline. *1979 Senate Report* 7, 10-11; *1974 Senate Report* 3, 39-41; *1974 House Report* 21-22.

As this Court recognized in both *Henderson* and *Bloate*, the pretrial motion exclusion in Section 3161(h)(1)(D), along with the other exclusions in Section 3161(h)(1), falls in the category of automatic exclusions. See *Bloate*, 130 S. Ct. at 1349, 1351-1353; *Henderson*, 476 U.S. at 326-327. Pretrial motions, which are filed in almost every criminal case, frequently shape the content and structure of the trial, and they may even eliminate the need for trial altogether. Accordingly, their resolu-

tion is a necessary part of the pretrial process, and exclusion of the time consumed in resolving them is warranted without a case-by-case inquiry.

The ruling of the court below that a pretrial motion triggers excludable time only if it caused an actual or expected postponement of the trial is not consistent with the statutory structure because the ruling makes the pretrial motion exclusion contingent on case-specific findings. Already, district courts applying the Sixth Circuit's rule have been compelled to make findings whether "motions are complex" or otherwise "cause[] a delay of the trial" in order to invoke the exclusion. *United States* v. *Jerdine*, No. 1:08-CR-00481, 2009 WL 4906564, at *5 (N.D. Ohio Dec. 18, 2009); see *United States* v. *Ballato*, No. 09-3453, 2010 WL 3398474, at *4 (6th Cir. Aug. 26, 2010) (remanding for district court to "determine whether the motions at issue caused delay or the expectation of a delay" of the trial).[10]

Indeed, to avoid possible dismissals under the Sixth Circuit's rule, some district courts have been relying on ends-of-justice continuances under Section 3161(h)(7), in addition to Section 3161(h)(1)(D), when excluding pre-

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[10] See, *e.g.*, *United States* v. *Gump*, No. 3:10-CR-94, 2010 WL 3655981, at *2 (E.D. Tenn. Sept. 10, 2010) ("find[ing] that the Defendants' motion is of such a nature that the time required to determine the issues creates excludable time"); *United States* v. *Johnson*, No. 09-20264, 2010 WL 779284, at *6 (E.D. Mich. Mar. 8, 2010) (finding that the motion "delayed trial or had the potential to delay trial"); *United States* v. *Sutton*, No. 3:09-CR-139, 2009 WL 5196592, at *1 (E.D. Tenn. Dec. 22, 2009) ("find[ing] that the Defendant's motions are of such a nature that the time required to determine the issues creates excludable time"); *United States* v. *Mayes*, No. 3:09-CR-129, 2009 WL 4784000, at *1 (E.D. Tenn. Dec. 8, 2009) ("find[ing] that this motion is complex in nature and that the time required to hear and rule upon the suppression motion causes a delay of the trial and, thus, creates excludable time").

trial motion delay. See, *e.g.*, *United States* v. *Gump*, No. 3:10-CR-94, 2010 WL 3655981, at *2 (E.D. Tenn. Sept. 10, 2010); *United States* v. *Sutton*, No. 3:09-CR-139, 2009 WL 5196592, at *2 (E.D. Tenn. Dec. 22, 2009); *United States* v. *Mayes*, No. 3:09-CR-129, 2009 WL 4784000, at *1 (E.D. Tenn. Dec. 8, 2009). The rule adopted by the court below thus frustrates the very purpose of Section 3161(h)(1)(D)'s automatic exclusion, which is designed to avoid the need for courts to devote time and resources to case-specific analyses of whether the benefits of delay from a particular motion outweigh the costs.

If this Court were to endorse the court of appeals' construction of the pretrial motion exclusion, the disruption of the statutory scheme could spread to the other automatic exclusions as well. Many of those other exclusions contain the same phrase—"delay resulting from"—on which the court below relied in imposing its novel limitation on the applicability of the pretrial motion exclusion. The same language appears in the provisions authorizing exclusion of delays associated with mental and physical competency examinations, 18 U.S.C. 3161(h)(1)(A); trial of the defendant on other charges, 18 U.S.C. 3161(h)(1)(B); interlocutory appeals, 18 U.S.C. 3161(h)(1)(C); proceedings relating to the transfer of a case or the removal of a defendant from another district, 18 U.S.C. 3161(h)(1)(E); transportation of a defendant from another district or to and from places of examination or hospitalization, 18 U.S.C. 3161(h)(1)(F); consideration of a proposed plea agreement, 18 U.S.C. 3161(h)(1)(G); the absence or unavailability of the defendant or an essential witness, 18 U.S.C. 3161(h)(3)(A); and the defendant's mental incompetence or physical inability to stand trial, 18 U.S.C. 3161(h)(4). The courts of appeals have nonetheless consistently held that the

applicability of those other exclusions is not contingent on a finding that the triggering proceeding or event caused postponement of the trial (or of the indictment, where the relevant STA deadline is the requirement in 18 U.S.C. 3161(b) that the indictment be brought within 30 days of arrest).[11] Adopting the interpretation of the phrase "delay resulting from" advanced by the court below could call into question that well-established approach to those other exclusions.

Adopting the interpretation of the court below could also unsettle established methods for determining the amount of time excluded by other automatic exclusions. In calculating the excludable time attributable to other proceedings concerning the defendant, such as competency examinations and interlocutory appeals, the courts of appeals generally do not consider how long (if at all) trial was postponed as a result of the relevant proceeding. Instead, the courts generally calculate the excludable time based on the duration of the proceeding itself. See, *e.g.*, *United States* v. *Neal*, 27 F.3d 1035, 1042 (5th Cir.) (excluding the time between the defendant's request for a competency examination and the determination that he was competent), cert. denied, 513 U.S. 1008 (1994), and 513 U.S. 1179 (1995); *United States* v. *Long*, 900 F.2d 1270, 1276 (8th Cir. 1990) (excluding the time

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[11] See, *e.g.*, *United States* v. *Pete*, 525 F.3d 844, 852 (9th Cir.) (interlocutory appeal), cert. denied, 129 S. Ct. 298 (2008); *United States* v. *Miles*, 290 F.3d 1341, 1350 (11th Cir.) (unavailability of essential witness), cert. denied, 537 U.S. 1089 (2002); *United States* v. *Davenport*, 935 F.2d 1223, 1233-1234 (11th Cir. 1991) (interlocutory appeal); *United States* v. *Robinson*, 887 F.2d 651, 656-658 (6th Cir. 1989) (trial on other charges); *Montoya*, 827 F.2d at 150 (same); *United States* v. *Shear*, 825 F.2d 783, 786 (4th Cir. 1987) (same), cert. denied, 489 U.S. 1087 (1989); *United States* v. *Pelfrey*, 822 F.2d 628, 635 (6th Cir. 1987) (interlocutory appeal).

between the filing of the notice of appeal and the district court's receipt of the appellate court's mandate). The current approach would be called into question if this Court adopted the view of the court below that the statutory term "delay" refers to postponement of the trial. Under that interpretation, the excludable "delay" resulting from a proceeding logically should be measured from the date that trial was otherwise scheduled to begin, rather than from the commencement of the proceeding that triggers the exclusion. Thus, if a defendant files notice of an interlocutory appeal a month before trial is scheduled to start, the excludable delay should begin only when that month has expired, not when the notice is filed. No court of appeals follows that approach. Thus, if this Court adopted the novel interpretation of the STA advanced by the court below, the current operation of the Act could be substantially disrupted.

D. The STA's Legislative History Confirms That The Pretrial Motion Exclusion Applies Automatically Upon The Filing Of Any Motion

The court of appeals' interpretation of the pretrial motion exclusion is also inconsistent with the STA's legislative history. The legislative record surrounding both the STA's original enactment in 1974 and the expansion of the pretrial motion exclusion in 1979 indicates that Congress used the phrase "delay resulting from" to refer to the time consumed by a proceeding or an event that triggers an exclusion, not the time during which trial might be postponed. And the history of the 1979 amendments leaves no doubt that Congress intended the exclusions in Section 3161(h)(1) for delays resulting from proceedings concerning the defendant, including pretrial motions, to apply automatically whenever a pro-

ceeding is pending, without the need for any additional findings.

The STA originated with S. 754, introduced in 1973 by Senator Ervin and reported to the full Senate in July 1974 by its Judiciary Committee. See Anthony Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 15 (1980) (Partridge). Like the current Act, S. 754 set a deadline for commencing trial, to be codified in 18 U.S.C. 3161(c), and provided various exclusions from that deadline, to be codified in 18 U.S.C. 3161(h). S. 754, § 101, 93d Cong., 2d Sess. (1974) (as passed by the Senate). Also like the current Act, Section 3161(h) described the exclusions as "periods of delay," and Section 3161(h)(1) excluded "[a]ny period of delay resulting from other proceedings concerning the defendant," including but not limited to various specified "delay[s]." *Ibid.* Those specified delays included "delay resulting from hearings on pretrial motions," as well as "delay resulting from" other listed proceedings, such as "any examination and hearing on competency." *Ibid.* The Senate Judiciary Committee Report explained that the exclusions for those proceedings were designed to "permit normal pre-trial preparation" in "ordinary noncomplex cases." *1974 Senate Report* 21. And the Senate Report repeatedly equated the statutory phrase "delay resulting from" with the time consumed by the proceedings themselves, rather than any time during which trial might be postponed.[12]

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[12] See, *e.g.*, *1974 Senate Report* 35 ("Subparagraph 3161(h)(1) allows the court to exempt from the time limits, time consumed by 'proceedings concerning the defendant.'"); *id.* at 37-38 (explaining that Section 3161(h)(1)(A) "provides for the exclusion of time consumed in competency hearings" and "days actually consumed by physicians in mental examination").

The Senate bill was reintroduced, after amendments, as a House bill, H.R. 17409, 93d Cong., 2d Sess. (1974), which was ultimately enacted into law. Partridge 15-16. Describing Section 3161(h)(1), the House Judiciary Committee Report explained that the bill "provides a number of exclusions from the running of the time limits to trial for proceedings concerning the defendant." *1974 House Report* 15. The House Report further stated that "[t]he time limits would be tolled by hearings, proceedings and necessary delay which normally occur prior to the trial of criminal cases." *Id.* at 21. Thus, like the Senate Report, the House Report indicates that the "delay resulting from" a specified proceeding or event is the duration of that proceeding or event, during which the speedy trial clock is stopped. See *Black's Law Dictionary* 1625 (9th ed. 2009) (defining to "toll" as "to stop the running of" "a time period, esp. a statutory one"); see also, *e.g.*, *1974 House Report* 33 (explaining that proposed Section 3161(h)(4), which excluded "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent," would exclude "the *period during which* a defendant is incompetent") (emphasis added).

Congress amended the STA in 1979 to address problems with its initial implementation. As described in the House and Senate Reports accompanying the 1979 amendments, one of Congress's concerns was that the Act's exclusions were being interpreted too restrictively. See *1979 Senate Report* 18, 21, 26; H.R. Rep. No. 390, 96th Cong., 1st Sess. 4, 11 (1979) (*1979 House Report*). Congress was particularly concerned about the exclusion for pretrial motions, which, under the STA as originally enacted, encompassed "delay resulting from hearings on pretrial motions," 18 U.S.C. 3161(h)(1)(E)

(1976). As the House Report explained, some courts had given that language "an unduly restrictive interpretation * * * as extending only to the actual time consumed in a pretrial hearing." *1979 House Report* 11. To correct the problem, Congress adopted the current language, which excludes "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(D). The Senate Report explained that this change "enlarged" the provision "to include, as excludable time, the entire period of time from the date of the filing to the conclusion of hearings on, or other prompt disposition of, pretrial motions." *1979 Senate Report* 33; accord *1979 House Report* 10. And the Senate Report made clear that "the section provides exclusion of time from the filing to the conclusion of hearings on or 'other prompt disposition' of *any* motion." *1979 Senate Report* 34 (emphasis added).

Like the 1974 reports, the 1979 Senate Report reveals that Congress equated the "delay resulting from" a proceeding with the period of time consumed by that proceeding, rather than the time during which trial might be postponed. The Report stated that the STA excludes from its deadlines "specific and recurring periods of time often found in criminal cases," "includ[ing] periods consumed by * * * proceedings concerning the defendant, including mental or physical examinations, other trials, interlocutory appeals and pretrial motions." *1979 Senate Report* 9. And the Report used interchangeably the terms "delay," "periods of delay," "periods of time," and "periods of excludable time" to de-

scribe the exclusions.[13] The Senate Report also stressed that time consumed by the "proceedings concerning the defendant" listed in Section 3161(h)(1), including pretrial motions, is "automatically exclud[ed]," without the need for findings like those required to exclude time under Section 3161(h)(7)'s ends-of-justice provision. *1979 Senate Report* 9-10.[14]

As the principal chronicler of the STA's legislative history has observed, at no point in the STA's development "did anyone suggest that the period of delay 'resulting from' a proceeding might be something other than the duration of the proceeding itself." Partridge 26. Likewise, nothing in the legislative record remotely suggests that the pretrial motion exclusion applies only if a motion delayed or was expected to delay the trial. On the contrary, the legislative history confirms the view—shared by leading commentators, as well as every

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[13] See, *e.g.*, *1979 Senate Report* 9-10 (referring to "automatically excludable delay," exclusions of "periods of time," "types of delay," and "delay automatically excluded"); *id.* at 20 (referring to "excludable time"); *id.* at 31 (referring to "periods of delay" that are "automatically excludable"); *id.* at 32 (referring to "event[s]" that "would automatically exclude time"); *id.* at 33 (referring to "specifically-enumerated periods of excludable time," "periods of delay" that "are to be automatically excluded," "excludable time" or "period[s] of time").

[14] See, *e.g.*, *1979 Senate Report* 9 (referring to the Section 3161(h)(1) provisions as "automatically excludable delay"); *id.* at 31 (stating that "periods of delay resulting from 'proceedings concerning the defendant'" are "automatically excludable"); *id.* at 32 (describing "a pretrial mental examination" as an example of "an event" that "would automatically exclude time"); *id.* at 33 (explaining that, under then existing law, "periods of delay consumed by" various proceedings, including "[h]earings on pretrial motions," were "automatically excluded"); *ibid.* (noting that the amendments would leave intact "the automatic application of exclusions as provided in existing law"); *id.* at 34 (referring to "the automatic exclusions for pretrial motions" under the amendments).

court of appeals other than the court below—that the pretrial motion exclusion is "automatic and no factual determination of whether the trial was actually delayed is necessary." 5 Wayne R. LaFave et al., *Criminal Procedure* § 18.3(b) at 142 n.28 (3d ed. 2007); accord Robert L. Misner, *Speedy Trial: Federal and State Practice* 268 (1983).

E. Automatically Excluding The Time Between The Filing Of Any Pretrial Motion And Its Disposition Furthers The STA's Purposes

The STA seeks to promote speedy criminal trials without sacrificing time needed for pretrial proceedings that help ensure the accuracy and fairness of the trials. See *Zedner* v. *United States*, 547 U.S. 489, 497 (2006); *1974 House Report* 8, 15, 21-22; *1974 Senate Report* 21; *1979 Senate Report* 19-20, 26. The STA therefore gives weight to interests other than expedition, and questions about the Act's application cannot be resolved simply by choosing the shortest time limits. See, *e.g.*, *id.* at 9 (noting that automatic exclusions for "specific and recurring periods of time often found in criminal cases" are necessary "to make compliance with" the Act's deadlines "a realistic goal"); *1974 House Report* 15 (explaining that "both delay and haste in the processing of criminal cases must be avoided" and that the STA seeks to promote "efficiency in the processing of cases commensurate with due process").

The STA cannot operate efficiently and practicably unless the rules governing its time limits are clear. The starting and stopping points of the speedy trial clock must be precisely defined and easily discernible. The government, the criminal defendant, and the district court must be able to know, as each day passes, whether

that day counts toward the 70-day deadline for commencing trial. Otherwise, they could not determine when they were approaching the date on which trial must begin. Without that information, neither counsel nor the court could establish realistic scheduling priorities that accommodate the competing demands on their time and resources. They would not know, for example, whether it was necessary to attempt to reschedule other less pressing matters or, if that was not possible, to seek an "ends-of-justice" continuance pursuant to Section 3161(h)(7). The inevitable result would be unwitting violations of the Act's 70-day limit and the unnecessary dismissal of indictments. See 18 U.S.C. 3162(a)(2).

Pretrial motions are routinely filed in nearly every federal criminal prosecution, and their resolution is an essential part of the pretrial process necessary to fair and accurate trials. As other courts of appeals have recognized, Congress accordingly provided in Section 3161(h)(1)(D) for the automatic exclusion of all time consumed in resolving pretrial motions, in order "to structure a method of calculating time which would be reasonably and practically, although not necessarily directly, related to the just needs for pretrial preparation in a particular case." *Cobb*, 697 F.2d at 42; see *Green*, 508 F.3d at 200; *Vogl*, 374 F.3d at 985-986; *Montoya*, 827 F.2d at 151.

The automatic exclusion reflects the reality that "[p]retrial motions necessarily take the time of [the opposing party] to respond and courts to evaluate." *United States* v. *Wilson*, 835 F.2d 1440, 1442 (D.C. Cir. 1987), abrogated on other grounds by *Bloate*, *supra*. And it also accounts for the practical necessity that, in order to ensure that trial commences within the STA's deadline in a particular case, the court and the parties

must be able to ascertain, as soon as a pretrial motion has been filed, whether or not the motion has stopped the speedy trial clock. "[A] clear rule" that all time consumed in resolving any pretrial motion is automatically excluded "puts [the court and] counsel on notice from the outset as to what is excludable." *United States* v. *Vo*, 413 F.3d 1010, 1015-1016 (9th Cir.), cert. denied, 546 U.S. 1053 (2005). It thus both facilitates compliance with the Act and advances the Act's goal of providing speedy trials without sacrificing the time needed to resolve important pretrial proceedings.

In contrast, the court of appeals' rule for the exclusion of pretrial motion delay is not consonant with the STA's purposes. The court's opinion does not make clear if excludability turns on a fact-specific determination whether a particular motion actually caused a postponement or the expectation of a postponement of the trial or turns instead on whether the trial court formally moved the trial date in response to the motion. Thus far, cases applying the decision generally appear to have interpreted it as requiring a fact-specific causation determination rather than a more formalistic inquiry into whether the scheduled trial date was postponed. See pp. 26-27 & note 10, *supra* (discussing cases). But however the decision is ultimately interpreted, it will not provide a workable rule that furthers the purposes of the Act.

If excludability turns on an individualized determination whether a particular motion causes an actual or expected postponement of the trial, the rule will greatly complicate, and could frustrate altogether, the parties' and the court's ability to comply with the Act. In many situations, neither the court nor the parties will be able to determine at the time that a motion is filed whether

the motion has stopped the speedy trial clock. The answer to that question will often not become apparent until later in the pretrial process when it becomes clear how much time will be needed to resolve the motion or what consequences will flow from granting the motion. The time needed for further briefing and resolution of any given motion will depend on the complexity of the legal issues involved, which often cannot be known until the parties and the court actually delve into those issues. Moreover, even when it is clear how much time will be needed to resolve a motion, it may often be unclear whether the disposition of the motion will ultimately require postponement of the trial. For example, if, as in this case, the court grants a motion to depose a witness, whether trial may or must be postponed will depend on the witness's availability for the deposition, a circumstance that may be both unpredictable and beyond the parties' and the court's control.

Requiring individualized determinations whether a particular motion actually caused or threatened postponement of the trial would also "force courts to resolve intractable causation issues," *Wilson*, 835 F.2d at 1442, possibly leading to extensive and collateral pretrial proceedings about whether time is excludable, *United States* v. *Dorlouis*, 107 F.3d 248, 254 (4th Cir.), cert. denied, 521 U.S. 1126 (1997). For example, if the parties were also engaged in discovery activities while a pretrial motion was pending, the district court would have to determine which of the two activities was responsible for the postponement of the trial. Or if the district court postponed trial both to permit the resolution of pretrial motions and because the court had a scheduling conflict, the court would have to answer the metaphysical question of which of the two reasons was the true cause of

the postponement. Such "question[s] frequently would pose more difficult issues than the trial itself and in some cases would be simply impossible to determine." *Cobb*, 697 F.2d at 42 n.6. Consequently, the court of appeals' rule would prevent district courts and the parties from calculating in advance the STA's deadline for commencing trial and enmesh courts and litigants in complex collateral disputes that might well add to, rather than reduce, pretrial delay.

If, on the other hand, excludability turns on whether the district court formally moves the trial date, the Sixth Circuit's rule will lead to arbitrary results that bear no relation to the Act's purposes. For example, if a district court initially set the trial date sufficiently far in advance to accommodate the resolution of anticipated pretrial motions, the time consumed in resolving those motions would not be excluded. If, however, the district court did not take the motions into account in setting the initial trial date (or miscalculated how much time they would consume), so that the court had to reset the trial date after the motions were filed, the time consumed in resolving the motions would be excluded. In addition, if a district court put off other matters so it could resolve motions quickly and therefore did not need to reset the trial date, no time consumed in resolving the motions would be excluded. If, however, the court set a more relaxed schedule for resolving the motions that enabled it simultaneously to address other matters, and the court therefore needed to reset the trial date, the entire time that the motions were pending would be excluded.

A rule that turned on whether the trial date was moved would be particularly problematic when, as in *Henderson* (see note 9, *supra*), the district court did not set the trial date until after motions were filed or re-

solved. In that situation, it is entirely unclear how the court and the parties would determine whether or not time consumed in resolving the motions was excludable. Because no trial date would exist to be reset, the court and the parties could only guess at whether the motions created an actual or expected postponement of a trial that had not even been scheduled.

Regardless of its precise contours, the interpretation of the pretrial motion exclusion adopted by the court below would disrupt the settled operation of the STA and undermine the Act's goal of providing a clear and administrable timetable for commencing criminal trials. In order for the STA to achieve that goal, the time from the filing of any pretrial motion through its disposition must be automatically excludable without regard to whether the particular motion actually causes a postponement, or the expectation of a postponement, of the trial.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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DECEMBER 2010

APPENDIX

SPEEDY TRIAL ACT—RELEVANT PROVISIONS

CURRENT VERSION
EFFECTIVE OCTOBER 13, 2008

1. Section 3161 of Title 18 of the United States Code provides in pertinent part:

Time limits and exclusions

* * * * *

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. * * *

* * * * *

(h) The following periods of delay shall be excluded in computing the time within which an information or an

indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered

into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for

the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make

a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

* * * * *

2. Section 3162 of Title 18 of the United States Code provides in pertinent part:

Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion

but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the

compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

* * * * *

SPEEDY TRIAL ACT
18 U.S.C. § 3161(h)

PRIOR VERSION
EFFECTIVE THROUGH OCTOBER 12, 2008

3. Until October 13, 2008, Section 3161(h) of Title 18 of the United States Code provided in pertinent part:

Time limits and exclusions

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom

the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

RESPONDENT'S BRIEF

Supreme Court, U.S.
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No. 09-1498

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JASON LOUIS TINKLENBERG,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

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BRIEF FOR RESPONDENT

Respondent Jason Louis Tinklenberg respectfully requests that this Court affirm the judgment of the court of appeals.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions of the Speedy Trial Act set forth in the appendix to the Government's brief, this case involves Federal Rule of Criminal Procedure 45 and the portion of the Insanity Defense Reform Act found at 18 U.S.C. § 4247(b). Those provisions are set forth in the appendix to this brief.

STATEMENT OF THE CASE

Subject to various excludable periods of delay, the Speedy Trial Act of 1974 requires the federal government to commence a criminal trial within 70 days of charging or of the defendant's first appearance. There is no dispute that at least 64 "nonexcludable" days elapsed before respondent Jason Tinklenberg's trial began. The question in this case is whether six more nonexcludable days elapsed before trial, thus violating the Act. The Sixth Circuit correctly held that nine additional nonexcludable days elapsed during the two weeks before trial, while three motions were pending that did not delay the commencement of trial. But the Sixth Circuit erroneously rejected respondent's alternative arguments that more than six additional days also elapsed in relation to transporting him to competency examinations and conducting those examinations.

1. In January 2005, police officers in Kalamazoo, Michigan stopped respondent for driving with an

open rear door and an expired registration tag. Upon searching respondent's vehicle, the officers discovered a pistol, as well as Sudafed tablets and other materials used to manufacture methamphetamine. Respondent subequently consented to a search of his residence, where the officers found a shotgun and additional materials used for manufacturing methamphetamine.

2. A grand jury in the Western District of Michigan later indicted respondent for possession of firearms after having been convicted of a felony and for possession of materials used to manufacture methamphetamine. Respondent's initial appearance before a magistrate judge took place on October 31, 2005.

Two days later, the magistrate granted respondent's request for a mental competency examination, ordering – consistent with 18 U.S.C. § 4247(b) of the Insanity Defense Reform Act – that the examination be completed within a period "not to exceed 30 days." JA 105. On November 10, 2005, respondent was designated to the Metropolitan Correctional Center in Chicago for a competency evaluation. He arrived there 20 days later. He then had to wait another four months before the competency examination was actually conducted. Although the Government initially asserted the respondent was not cooperating with the effort to evaluate him, JA 108, it never offered any justification for the bulk of this delay, other than asserting without elaboration in a second motion for an extension of time that the facility needed additional time to do its job, JA 114. The facility's examining physician eventually found respondent

competent to stand trial, and the magistrate agreed. JA 117.

Shortly thereafter, respondent requested a second, independent competency evaluation. The magistrate granted this request, and the evaluation again took over 30 days (this time, over two extra weeks to complete. Pet. App. 4a. After the examination, the magistrate once again found respondent competent to stand trial. Pet. App. 4a. After six more weeks passed, the district court set a trial date of August 14, 2006. Pet. App. 4a.

In early August, the Government filed two "mundane" administrative motions, which the court noted, and the parties agreed, "would not affect the trial schedule." Pet. App. 20a. On August 1, the Government moved to conduct a video deposition of a witness, the public safety officer found the firearm and ammunition in respondent's vehicle, who could not attend trial. JA 139. On August 3, the district court granted this motion and directed the parties to "schedule the deposition posthaste so as not to delay trial," which the parties did. JA 145. Then, on August 8, the Government moved for formal permission to bring respondent's seized firearms into the courtroom as evidence during trial. JA 28, 147-48; Pet. App. 5a.[1] On August 10, the district court granted this motion as well. JA 149; Pet. App. 4a-5a. Respondent did not oppose either motion. As the

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[1] Although the Government's motion is dated August 7, JA 147-48, the district court's docket sheet makes clear that it was not actually filed until August 8. JA 28; *see also* U.S. Br. 7 (using August 8 date).

parties had anticipated at the outset of the motions' filings (and as the district court had directed), neither motion caused any postponement of the trial, or ever threatened to do so.

On Friday, August 11, 2006, the last business day before trial, respondent moved to have the indictment dismissed on the ground that the 70-day period for commencing trial under the Speedy Trial Act had expired. There is no dispute that from respondent's initial appearance through July 31, 2006, 60 nonexcludable days elapsed. Pet. App. 15a; U.S. Br. 8. There also is no dispute that four more nonexcludable days elapsed between August 4 and August 7, 2006, when no pretrial motions were pending. Pet. App. 31a. Thus, at least 64 nonexcludable days had elapsed at the time respondent filed his motion to dismiss.

Respondent's motion suggested three independent reasons – each stemming from different subsections of Section 3161(h)(1) of the Act – why at least six more nonexcludable days had elapsed, thus violating the Act. First, Subsection (D) excludes "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." While two Government motions were pending for six days in August, no "delay result[ed] from" either of them in the sense that neither motion hindered pretrial preparations nor postponed when trial could begin. Second, Subsection (F) provides that "any time consumed in excess of ten days" in transporting a defendant to a place of examination "shall be presumed to be unreasonable" and thus nonexcludable. Yet it took 20 days, ten more than

this allotted amount, to transport respondent to his first competency examination. Third, while Subsection (A) excludes time resulting from conducting competency evaluations, 18 U.S.C. § 4247(b) of the Insanity Defense Reform Act requires such evaluations (save exceptions not relevant here) to be conducted within 30 days. Yet it took several months to conduct respondent's competency evaluations.

The district court rejected each of these three possibilities and denied respondent's motion to dismiss. Pet. App. 29a-36a. Trial began, as scheduled, on August 14. The jury found respondent guilty of all three charges. He was sentenced to 33 months in prison, to be followed by three years of supervised release.

3. The Sixth Circuit reversed, concluding that the time in which pretrial motions were pending in early August was nonexcludable under the Act. The court of appeals explained that the plain language of Subsection (D) – specifically the prefatory words "delay resulting from" – excludes the time in which pretrial motions are pending only where such motions cause, or are expected to cause, actual delay. Pet. App. 16a-17a, 20a. Given the "obvious understanding of the parties and the court [here] that the motions . . . would not affect the trial schedule," the court of appeals held that the time during the pendency of those motions was nonexcludable. Pet. App. 20a.

The court of appeals also held that neither of respondent's two arguments relating to the time it took to arrange and to conduct his competency evaluations warranted adding six or more

nonexcludable days. First, while agreeing with respondent that time beyond Subsection (F)'s ten-day allotment for transportation was unreasonable (indeed, the Government did not argue otherwise), the court of appeals determined that only two of the ten extra days it took to transport him were actually nonexcludable. Pet. App. 14a. Under Sixth Circuit precedent as of the time of the relevant proceedings here, Subsection (F)'s ten-day allotment did not count weekends and holidays, and the remaining eight of the ten extra days during which respondent awaited transportation were weekends and holidays (Veterans Day and Thanksgiving). Pet. App. 14a (citing *United States v. Bond*, 956 F.2d 628, 632 (6th Cir. 1992)).

Second, the Sixth Circuit held, again following circuit precedent, that the 30-day limit for conducting competency examinations under 18 U.S.C. § 4247(b) "does not limit the time period for a competency examination with respect to calculations under the Speedy Trial Act." Pet. App. 12a (quoting *United States v. Murphy*, 241 F.3d 447, 456 (6th Cir. 2001)). Accordingly, the court of appeals refused to render nonexcludable any of the days beyond 30 days during which the Government detained respondent awaiting his competency examinations, based on nothing more than an assertion that it needed more time.

4. The Government filed a petition seeking rehearing en banc, which the court of appeals denied without any judge requesting a vote on it. Pet. App. 37a.

5. This Court granted certiorari. 131 S. Ct. 62 (2010).

SUMMARY OF ARGUMENT

There are three independent reasons why at least six days, in addition to the 64 days that are not disputed here, elapsed from the speedy trial clock in this case, thus violating the Speedy Trial Act.

I. The Sixth Circuit correctly held that the speedy trial clock did not stop during the six days while the Government's two unopposed, administrative motions to bring evidence to court and to conduct a deposition were pending.

A. Subsection 3161(h)(1)(D) provides that the days during which pretrial motions are pending are excluded from the speedy trial count only if "delay result[s] from" the motions. The ordinary meaning of "delay" is a postponement or hinderance to progress. Consequently, motions (such as the ones at issue here) that the parties and the court know from the moment they are filed will not take up anyone's time do not stop the speedy trial clock. The structure of the Act reinforces this conclusion. The subsections of Section 3161(h)(1) list types of "proceedings" that toll the speedy trial clock *if the proceeding causes delay*. The purpose of these subsections, therefore, is to list types of proceedings covered by the Act, not to announce that any type of proceeding automatically constitutes delay.

B. There is no reason to depart from the plain meaning of Subsection (D). Prior precedent does not dictate any outcome here; in *Henderson v. United States*, 476 U.S. 321 (1986), this Court took it as a given that the pretrial motions at issue postponed when trial could begin, and *Bloate v. United States*, 130 S. Ct. 1345 (2010), did not even involve the

pendency of a pretrial motion. The legislative history of the Speedy Trial Act does not directly address the issue either, and the isolated snippets the Government quotes seem to assume the pretrial motions toll the clock only when they consume time and resources.

Finally, the purpose and functionality of the Act are best served by declining to exclude from the speedy trial count time during the pendency of unopposed, administrative motions. Parties will almost always know, as they did here, as soon as a motion is filed whether the motion will hinder pretrial preparations. In the rare instance in which the Government is forced to guess and guesses wrong, the Act accounts for this possibility by providing that the indictment will typically be dismissed without prejudice, allowing the Government promptly to re-indict the defendant. On the other hand, if the Government were correct that *every* pretrial motion *automatically* tolled the speedy trial clock during its pendency, then Subsection (D) would thwart the Act's objective of guaranteeing speedy justice by stopping the clock for no good reason. Worse yet, the Government's categorical rule would lead to arbitrary results depending on whether motions are decided promptly or tabled and would allow the Government to manipulate the clock by filing motions regarding issues that could easily be handled orally at trial.

II. Eight nonexcludable days beyond those counted by the court of appeals elapsed while respondent was awaiting transportation to the facility where his competency evaluation took place. Subsection 3161(h)(1)(F) presumes that time beyond

"ten days" for transportation is unreasonable. Contrary to the Sixth Circuit's holding that this provision, at the time of this case's pretrial proceedings, excluded weekends and holidays (and thus that only two of the ten extra days it took to transport respondent were excludable), this provision has always counted calendar days. This Court has treated other provisions of the Speedy Trial Act as counting calendar days, and the common law rule is that statutory time periods beyond one week count calendar days unless they explicitly provide otherwise. Furthermore, some ten-day time periods in the U.S. Code expressly exclude weekends and holidays, whereas some do not. This makes it clear that when Congress wishes to exclude weekends and holidays, it does so expressly.

Nothing about Fed. R. Crim. P. 45(a) alters this analysis. Although that provision formerly excluded weekends and holidays from time periods less than 11 days (it no longer does so), it did not apply by its terms to statutory time periods. The Rule's amendment history and a comparison to other federal rules of procedure confirm that this omission was intentional and must be given meaning.

III. Several nonexcludable months beyond those counted by the court of appeals elapsed while respondent was at the designated facility awaiting his competency evaluations. Subsection 3161(h)(1)(A) excludes time relating to such evaluations, but 18 U.S.C. § 4247(b) of the Insanity Defense Reform Act requires such evaluations to be conducted within 30 days. Because these two provisions of Title 18 of the U.S. Code share a common objective – ensuring speedy competency

evaluations – they should be read to complement each other.

At the very least, the Sixth Circuit's refusal to incorporate Section 4247(b) into the Speedy Trial Act cannot be reconciled with its decision simultaneously to incorporate Criminal Rule 45(a). If the Speedy Trial Act does not incorporate the counting rule Section 4247(b), then there is basis whatsoever for incorporating the counting rule in former Criminal Rule 45(a) – a legal provision of inferior authority that the Act did not even reference and that by its own express terms did not apply to statutes. That insight alone is enough to compel affirmance.

ARGUMENT

The "manifest purpose" of the Speedy Trial Act, as its name indicates, is to "ensur[e] speedy trials." *Bloate v. United States*, 130 S. Ct. 1345, 1355 (2010). In other words, the Act is designed to "quantify and make effective" a vital "Sixth Amendment right." *Henderson v. United States*, 476 U.S. 321, 333 (1986) (White, J., dissenting). Speedy trials are vital in order to "(i) to prevent oppressive pretrial incarceration, (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker v. Wingo*, 407 U.S. 514, 532 (1972); *accord Smith v. Hooey*, 393 U.S. 374, 377-78 (1969); *United States v. Ewell*, 383 U.S. 116, 120 (1966). The "disadvantages for the accused who cannot obtain his release are even more serious." *Barker*, 407 U.S. at 532. "The time spent in jail awaiting trial . . . often means loss of a job; it disrupts family life; and it enforces idleness," all while "living

under a cloud of anxiety, suspicion, and often hostility." *Id.* at 532-33.

"[T]he Act serves not only to protect defendants, but also to vindicate the public interest in the swift administration of justice." *Bloate*, 130 S. Ct. at 1356; *accord Zedner v. United States*, 547 U.S. 489, 501 (2006). A court's failure to provide a speedy trial can create "a large backlog of cases," encouraging plea bargaining in cases that should be tried. *Barker*, 407 U.S. at 519. In addition, when defendants are detained awaiting trial for such lengthy periods, society must foot the bill for the detention while it "lose[s] wages which might have been earned, and it must often support families of incarcerated breadwinners." *Id.* at 521. Jails also become increasingly "overcrowd[ed]." *Id.* at 520.

With these various realities "firmly in mind," *Zedner*, 547 U.S. at 501, the Act provides that trial "shall commence within seventy days" from the defendant's indictment or first appearance, whichever is later. 18 U.S.C. § 3161(c)(1). At the same time, the Act recognizes that "there are valid reasons for greater delay in particular cases." *Zedner*, 547 U.S. at 497. The Act therefore excludes specified "periods of delay" from the Act's 70-day limit, among them "[a]ny period of delay resulting from other proceedings concerning the defendant." 18 U.S.C. § 3161(h)(1).

Respondent was kept in federal custody for 285 days from his first appearance until the start of his trial. There is no dispute that at least 64 of these 285 days are not excluded from the speedy trial clock (60 days from respondent's first appearance through July 31, 2006, U.S. Br. 8; Pet. App. 15a, and four days

from August 4th through August 7th when no pretrial motion was pending and no other reason for tolling existed, U.S. Br. 7-8; Pet. App. 15a). This case turns, therefore, on whether six of the 221 remaining days that elapsed before trial began were nonexcludable.

There are three reasons why six or more such days were nonexcludable. First, the court of appeals correctly held that six nonexcludable days elapsed during which two mundane, unopposed pretrial motions that the Government filed in the days leading up to trial were pending. Second, the court of appeals erroneously excluded eight days (in excess of the ten calendar days that the Act presumptively allows) during which respondent was being transported for a competency evaluation. Third, the court of appeals erroneously excluded several weeks of time during which respondent was awaiting competency evaluations, all of which exceeded the 30-day limit in Insanity Defense Reform Act.[2]

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[2] The Government's petition for certiorari raised only the first of these three issues. But in order to reverse, this Court would need to reach the second and third issues because the court of appeals reached them; they supply alternate grounds for affirmance; and respondent preserved them in his brief in opposition pursuant to Rule 15.2. *See, e.g.*, *Zedner*, 547 U.S. at 503 (considering "the Government's alternative grounds in support of the judgment below" in Speedy Trial Act case).

I. The Speedy Trial Act Does Not Exclude The Time During Which The Government's Two Unopposed, Administrative Pretrial Motions Were Pending.

Even though the two unopposed, administrative pretrial motions the Government filed in the days leading up to trial did not hinder pretrial preparations or postpone when trial could begin, the Government argues that Subsection 3161(h)(D) of the Act requires exclusion of the six days during which the motions were pending because "the filing of *any* pretrial motion *automatically* stops the speedy trial clock." U.S. Br. 16 (emphasis added).[3] In so arguing, the Government takes pains to note that "the courts of appeals had uniformly" adopted such an automatic rule of exclusion until the Sixth Circuit's decision here. U.S. Br. 16; *accord id.* 9, 11. As past decisions from this Court demonstrate, however, such a prior consensus matters only insofar as the reasoning in the prior opinions is persuasive. *Compare, e.g.*, *United States v. Gaudin*, 28 F.3d 943, 955 (9th Cir. 1994) (en banc) (Kozinski, J., dissenting) (noting that Ninth Circuit decision created a conflict with "every circuit except the Federal," which did not have jurisdiction over the issue), *with* 515 U.S. 506 (1995)

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[3] The court of appeals also considered whether the time during the pendency of a third motion, respondent's motion to dismiss for a violation of the Speedy Trial Act, should be excluded. Pet. App. 20a. But because including the time during the pendency of the Government's two administrative pretrial motions would be sufficient to violate the Act, there is no need for this Court to consider whether the time during which respondent's Speedy Trial motion was pending was excludable.

(affirming decision by 9-0 vote based on plain text of the statute). Here, the reasoning in the prior opinions is not persuasive.

The text of the Speedy Trial Act could not be clearer: it excludes from the speedy trial clock only periods of "delay." Subsection 3161(h)(1)(D) thus does not exclude periods of time during which mundane administrative pretrial motions are pending. Furthermore, neither this Court's precedent, nor the Act's legislative history, nor alleged administrability concerns warrant departing from Subsection (D)'s plain meaning.

A. The Text And Structure Of Subsection 3161(h)(1)(D) Demonstrate That It Does Not Exclude Periods During The Pendency Of Unopposed, Administrative Petrial Motions.

Subsection (D) excludes from the Act's 70-day rule "[a]ny period of delay resulting from other proceedings concerning the defendant, including . . . delay resulting from pretrial motions, from the time of filing through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(D). This provision's text and structure dictate that it does not categorically exclude the time between the filing of every pretrial motion and its disposition.

1. Text

a. *"Delay."* The key word in the provisions at issue is "delay." The introductory text of Section 3161(h) excludes "periods of *delay*," 18 U.S.C. § 3161(h) (emphasis added). The word "delay" is repeated in Section 3161(h)(1) and in Subsection

3161(h)(1)(D). The ordinary meaning of "delay" is "to postpone until a later time;" or "to cause to be later or slower than expected or desired." The American Heritage Dictionary 480 (4th ed. 2000); *see also* Shorter Oxford English Dictionary 635 (6th ed. 2007) (a delay is a "[h]indrance to progress"). The legal meaning of the term likewise is "[t]he period during which something is postponed or slowed." Black's Law Dictionary 491 (9th ed. 2009). Accordingly, as the court of appeals noted (Pet. App. 17a), "[t]here is no conceivable way" to read the language in Subsection (D) as allowing a court to exclude the time during which a pretrial motion was pending unless the motion postponed, or slowed preparation for, trial.

The Government contends, however, that another "common meaning" of the word "delay" is simply "'[t]he interval of time between two events.'" U.S. Br. 17 (quoting the fourth of the four definitions in The American Heritage Dictionary 480 (4th ed. 2006)). The most sensible reading of this definition, consistent with those listed above, is that it implicitly assumes that the second event begins later than was previously hoped or was possible. But even if the American Heritage Dictionary – unlike any other leading dictionary – actually advances a definition of "delay" that lacks any connotation of a postponement or hindrance, it would not matter.[4] As this Court

[4] The closest any dictionary besides the American Heritage comes to the Government's desired meaning of "delay" is defining the term as "the time during which something is delayed." Webster's Third New International Dictionary of the English Language 595 (1971); *accord* The Random House

repeatedly has held, "[w]hen terms in a statute are undefined, we give them their ordinary meaning." *Hamilton v. Lanning*, 130 S. Ct. 2464, 2471 (2010) (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)); *see also Gross v. FBL Financial Servs.*, 129 S. Ct. 2343, 2350 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (quotation and citation omitted). The ordinary meaning of "delay" plainly denotes something more than a mere interval of time; it indicates a postponement or hindrance concerning when an event can begin. If Congress had wished to exclude all time during the pendency of pretrial motions, it would have excluded "time" during the pendency of such motions, not "delay" resulting from them.

Implementing the ordinary definition of "delay" in the context of the Act, Subsection (D) excludes periods of time during which pretrial motions are pending only when those motions require trial to begin later than would otherwise be possible.[5]

Dictionary of the English Language 526 (2d ed. 1987). But as the Random House example of usage makes clear, this (circular) definition of "delay," like other more straightforward ones, assumes a postponement. *See* The Random House Dictionary at 526 ("The ballet performance began after a half-hour delay.").

[5] Asking whether the motion causes "delay" in the sense that it requires trial to begin later than would otherwise be *possible* captures both (i) whether the motion actually "delay[s] trial" and (ii) whether it has "the potential to cause any such delay" – that is, whether it would have required trial to be

Unopposed, mundane, administrative motions do not satisfy this test, for they do not impede any party's preparation for trial or consume any judicial resources to resolve.

b. *Surrounding language.* Two other pieces of language that frame Subsection (D) confirm this analysis.

i. Section 3161(h)(1) excludes delay "resulting from" other proceedings, and Subsection (D) excludes time "resulting from" pretrial motions. The phrase "resulting from" underscores that Subsection (D) excludes periods of delay that occur *as a consequence of* pretrial motions, not merely the time during which such motions are pending. As this Court has explained, "[o]n its face, subsection [(D)] excludes '[a]ny period of delay' *caused by* 'any pretrial motion.'" *Henderson v. United States*, 476 U.S. 321, 326 (1986) (emphasis added); *see also Bloate* 130 S. Ct. at 1352 n.9 (accepting that the phrase "resulting from" means "as a consequence of"); *id.* at 1361 (Alito, J., dissenting) ("The phrase 'resulting from' means 'proceed[ing], spring[ing], or aris[ing] as a consequence, effect, or conclusion.'" (quoting Webster's Third New International Dictionary 1937 (1971)).

The Government's reading of Subsection (D), by contrast, is unable to give any intelligible meaning to the phrase "resulting from." According to the

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postponed had it been scheduled earlier. Pet. App. 16a. It thus avoids the formalism of asking merely "whether the district court formally moves the trial date." U.S. Br. 38.

Government, "'delay resulting from' a pretrial motion is the period of time between the filing of the motion and its disposition, *during which the speedy trial clock [is] stopped.*" U.S. Br. 18 (emphasis added) (citation omitted). In this formulation, the Government actually concedes that "delay" requires postponement, but contends that what must be postponed is the *statutory deadline* for starting trial rather than the ability to start trial itself. This is completely circular. The whole point of applying Subsection (D) – like the other subsections of Section 3161(h)(1) – is to determine whether to exclude a period of time from the Act's 70-day time period. 18 U.S.C. § 3161(h). One therefore cannot assume in applying that Subsection that the "the speedy trial clock [is already] stopped." U.S. Br. 18.

In much the same way, the Government errs in claiming that Subsection (D) "defines" a motion's filing and disposition as "the starting and ending points" of an excluded period of time, irrespective of whether the pretrial motion results in any actual postponement. U.S. Br. 17. As this Court made clear last Term in *Bloate*, the filing and disposition of a motion simply demarcate *limits* on the delays that are excluded pursuant to Subsection (D). Delay that takes place between a motion's filing and its disposition is excluded pursuant to Subsection 3161(h)(1)(D), *Bloate*, 130 S. Ct. at 1353, while delay that occurs before a motion's filing or after its disposition may be excluded only pursuant to Section 3161(h)(7) on findings that the "ends of justice" would be served, *Bloate*, 130 S. Ct. at 1357-58. In either instance, however, the statute excludes only periods of "delay."

ii. Section 3161(h)(1) leads into Subsection (D) by providing that the Act excludes "any" period of delay resulting from other proceedings concerning the defendant. Congress' use of the introductory word "any," instead of the definite article "the," underscores the conditional nature of the exclusion in Subsection (D). It will not always be the case that other proceedings will result in a postponement of when trial could begin; only when they do is there be a reason for excluding time from the speedy trial clock.

This distinction between the import of the words "any" and "the" is reinforced by other provisions of the U.S. Code. The Code uses the phrase "*the* period of delay resulting from" in contexts where delay would necessarily occur: for example, when an intervening period of notice and comment would invariably postpone the subsequent public release of information.[6] In contrast, the Code uses the phrase

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[6] *See, e.g.*, 15 U.S.C. § 2217(4) (postponing the release of information pending a period of notice and comment "if the delay resulting from such notice and opportunity for comment would not be detrimental to health and safety"); 33 U.S.C. § 1513(b)(4) (postponing the release of information pending a period of notice and comment "if the delay resulting from such notice and opportunity for comment would not be detrimental to the public health and safety"); 42 U.S.C. § 9122(b)(1)(B) (postponing the release of information pending a waiting period after notice to the parties "unless the delay resulting from such notice would be detrimental to the public health or safety or the environment"); 49 U.S.C. § 1114(b)(1)(D) (postponing the release of information pending a period of notice and comment "if the delay resulting from notice and opportunity for comment would not be detrimental to health and safety").

"*any* delay resulting from" or "*a* period of delay resulting from" in contexts where it is uncertain whether postponement will result.[7] The only way to give meaning to these differing qualifiers before the word "delay" is to recognize that delay automatically results from the event described only when Congress used the phrase "the delay."

2. Structure

The structure of Section 3161(h)(1) confirms that Subsection (D) does not automatically exclude time from the speedy trial clock during the pendency of every pretrial motion.

Section 3161(h)(1) excludes "[a]ny period of delay resulting from *other proceedings* concerning the defendant, including but not limited to" the periods of delay listed in Subsections (A) through (H). 18 U.S.C. § 3161(h)(1) (emphasis added). Subsections (A) through (H) illustrate the types of "other proceedings" referenced in Section 3161(h)(1). Accordingly, as this Court explained last Term, Subsection (D) "governs the automatic excludability of delays 'resulting' from *a specific category of 'proceedings concerning the defendant*,' namely,

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[7] *See, e.g.*, 15 U.S.C. § 78o-5(b)(2)(C)(iii)(II) (requiring inter-agency consultation "unless the appropriate regulatory agency determines that any delay resulting from such consultation would be inconsistent with ensuring the financial and operational condition of the government securities broker"); 49 U.S.C. § 21102(a)(4) (exempting from a limit on the monthly hours worked by a rail worker "a delay resulting from a cause unknown and unforeseeable to a railroad carrier or its officer or agent in charge of the employee when the employee left a terminal").

proceedings involving pretrial motions." *Bloate*, 130 S. Ct. at 1352-53 (emphasis added) (footnote omitted); *see also* S. Rep. No. 1021, 93d Cong., 2d Sess. at 36 (1974) ("*1974 Senate Report*") ("[T]he committee has enumerated in the text of the bill examples of what is meant by 'proceedings concerning the defendant.' The list is not meant to be exhaustive. It is representative of procedures of which a defendant might legitimately seek to take advantage for the purpose of pursuing his defense.")

Put another way, the function of Subsection (D) is not – as the Government would have it (U.S. Br. 25) – to specify a type of *time period* that the Act categorically excludes. Rather, the point of the Subsection is to identify a particular type of "other proceeding[]," – namely, a pretrial motion – that gives rise to excludable time *when it causes delay*.

The Government tries to avoid this straightforward structural analysis in two ways, but neither works. First, the Government argues that whereas Section 3161(h)(7) excludes delay "only if the district court makes certain findings" concerning the ends of justice, Subsection (D) "is automatic and applies 'without district court findings.'" U.S. Br. 24-25 (quoting *Bloate*, 130 S. Ct. at 1351). It is true that a district court applying Subsection (D) should not conduct any reasonableness analysis or otherwise make findings concerning the ends of justice. But it does not follow – and this Court never suggested in *Bloate* – that a court applying Subsection (D) need not even determine whether a pretrial motion caused any actual delay.

Second, the Government contends that Subsection (D) cannot require actual delay because

"[i]n calculating the excludable time attributable to other proceedings concerning the defendant, . . . courts generally calculate the excludable time based on the duration of the proceeding itself." U.S. Br. 28. But nothing in the Sixth Circuit's holding is inconsistent with this method of calculating how much time to exclude when another proceeding concerning the defendant results in delay. That holding simply requires the Government to demonstrate that a pretrial motion postponed or hindered when trial could begin. This Court need not address how much time to exclude if a motion hinders pretrial preparations, because the parties agree that the mundane motions in this case did not postpone when trial could begin.

At any rate, there is good reason to believe that, if a pretrial motion causes delay, the terms of Subsection (D) require a court to exclude the entire time "from the filing of the motion through the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(D). In other words, just as with other proceedings concerning the defendant, the threshold question in implementing Subsection (D) is whether the pendency of a pretrial motion resulted in any delay. If it did, then the duration of the whole proceeding (that is, the entire time the motion was pending) is excluded.

B. There Is No Reason To Depart From The Plain Meaning Of Subsection (D) In Light Of This Court's Precedent, The Act's Legislative History, Or Alleged Administrability Concerns.

The Government's brief quickly moves past statutory text to argue that precedent, the Act's legislative history, and policy considerations require this Court to adopt its rule automatically excluding time during which all pretrial motions are pending, even if those motions cause no delay at all. *Compare* U.S. Br. 16-20 *with* 20-39. But when the text of a statute is unambiguous, "judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *see also Caminetti v. United States*, 242 U.S. 470, 490 (1917) ("If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning."). And here, the text of Subsection (D) simply does not automatically exclude time during the pendency of every pretrial motion. But even if Subsection (D) were at all ambiguous, none of the Government's arguments warrants deviating from what the court of appeals properly perceived is the far better reading of the Subsection.

1. Precedent

The Government contends that this Court's decisions in *Henderson v. United States*, 476 U.S. 321 (1986), and *Bloate v. United States*, 130 S. Ct. 1345 (2010), establish that "the [Subsection (D)] exclusion applies *automatically* upon the filing of any

pretrial motion, without the need for a finding that the motion affected or could have affected the trial schedule." U.S. Br. 20 (emphasis added). These cases, however, do not so hold.

In *Henderson*, this Court ruled that Subsection (D) excludes periods of delay resulting from pretrial motions even if the delay they caused was not "reasonably necessary." 476 U.S. at 330. But, contrary to the Government's contention, nothing in *Henderson* suggests that Subsection (D) excludes time during the pendency of motions even if the motions do not hinder pretrial preparation or postpone when trial could begin. Rather, this Court took it as a given that the motions at issue there *had caused such delay*, for the motions had caused the trial court to grant a continuance and to push back trial several months. *Henderson*, 476 U.S. at 324-25.

This Court confirmed the limited reach of *Henderson*'s holding last Term in *Bloate v. United States*, 130 S. Ct. 1345 (2010). In the course of holding that delay associated with preparing pretrial motions is not excludable under Subsection (D), this Court explained that the excludability of delay arising from the pendency of pretrial motions is "automatic" simply "in the sense that a district court must exclude such delay from a Speedy Trial Act calculation without any further analysis as to whether the benefit of the delay outweighs its cost." *Id.* at 1349 n.1. In other words, "[t]he word 'automatic'" is merely "a useful shorthand" to denote that once a pretrial motion has caused delay, a court must exclude the time during which it was pending. *Id.* Just as in *Henderson*, this explanation presumes that Subsection (D) excludes time during the

pendency of pretrial motions only if the motions postponed when trial could begin.

2. Legislative History

Just last Term, the Government reminded this Court that "the [Speedy Trial] Act's legislative history, although comprehensive, is often contradictory and unhelpful." Brief for United States at 33 n.9, *Bloate v. United States* (No. 08-728). Indeed, this Court has previously recognized that the Act's legislative history is a poor guide to the statute's meaning. *See Henderson*, 476 U.S. at 330 (rejecting a portion of legislative history as "at odds with the plain language of the statute" and "contrary to other passages contained in both the House and Senate Reports"); *United States v. Taylor*, 487 U.S. 326, 335 n.8 (1988) (finding portions of the Act's legislative history "largely unhelpful"); *see also Rojas-Contreras*, 474 U.S. 231, 237 (1985) (Blackmun, J., concurring in the judgment) (same). The Government nonetheless contends here that the Act's legislative history "indicates that Congress used the phrase 'delay resulting from' to refer to the time consumed by a proceeding or an event that triggers an exclusion, not the time during which trial might be postponed." U.S. Br. 29. The legislative history does not support that conclusion.

The Government's argument hinges primarily on its assertion that the 1974 Senate Report concerning the Act "equated the statutory phrase 'delay resulting from' with the time *consumed* by the proceedings themselves, rather than any time during which trial might be postponed." U.S. Br. 30 (emphasis added). But a proceeding concerning the defendant

"consumes" time only by occupying the time of the parties or by drawing on judicial resources, thereby postponing when trial can begin. Thus, to the extent that isolated snippets of the legislative history may appear to "equate" the phrase "delay resulting from" with the period of time during which the proceeding was taking place, the snippets simply presuppose a finding that the periods of time during which proceedings were taking place impeded pretrial preparations or postponed when trial could begin.

Insofar as the legislative history provides any guidance, it suggests that Section 3161(h)(1) excludes periods of time during which other proceedings are taking place only if those proceedings hinder pretrial preparation or postpone when the subsequent trial can begin. The 1974 Senate Report explained that Section 3161(h)(1) excludes "[d]elays *caused by* proceedings relating to the defendant such as hearings on competency to stand trial, hearings on pretrial motions, trials on other charges, and interlocutory appeals." *1974 Senate Report* at 35 (emphasis added). This causation language indicates that the Act treats the concept of "delay" as a meaningful prerequisite to excluding time from the speedy trial clock.

Nothing in the legislative history of the 1979 amendments to the Speedy Trial Act suggests that Congress meant to disturb this understanding of "delay." Rather, that legislative history reinforces that Congress envisioned automatically excluding "the entire period of time" (U.S. Br. 32) during which

pretrial motions were pending only when those motions "consumed" time. S. Rep. No. 212, 96th Cong., 1st Sess., at 9 (1979) ("*1979 Senate Report*").[8] As the 1979 Senate Report explained, "it would indeed be anomalous to permit the defendant to benefit from delay proper[l]y undertaken to protect his interests in a fair adjudication of the charges against him by allowing dismissal without exclusion of that time." *Id.* A defendant could "benefit" from such "delay" only if pretrial motions pushed the date on which trial could begin past the original expiration date of the speedy trial clock.

3. Administrability

Finally, the Government asserts that "the STA cannot operate efficiently and practicably" under a rule excluding only actual delays because "[t]he government, the criminal defendant, and the district court must be able to know, as each day passes, whether that day counts toward the 70 day deadline for commencing trial," and an "actual delay" requirement would make that impossible. U.S. Br.

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[8] Congress enlarged Subsection (D)'s exclusion to "include, as excludable time, the entire period of time from the date of the filing to the conclusion of hearings on, or other prompt disposition of, pretrial motions," *1979 Senate Report* at 33, to address a very specific problem: that some courts had given the Subsection "an unduly restrictive interpretation . . . as extending only to the actual time consumed in a pretrial hearing" itself, H. Rep. No. 390, 96th Cong., 1st Sess., at 11 (1979). The amendments made clear that when a pretrial motion causes delay, a court may excludes time beyond the duration of the hearing itself.

34-35.[9] But once the ordinary meaning of a statute is clear, this Court lacks the authority to rewrite the statute to avoid "practical problems" it perceives with its implementation. *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010). If it turns out the statute's language imposes "unintended" administrative burdens, that reality "is a problem for Congress, not one that federal courts can fix." *Id.*

In any event, Subsection (D)'s "actual delay" prerequisite is eminently sensible and fully workable. Indeed, it is the Government's proposed "automatic exclusion" rule that would frustrate the Act's purposes and complicate its functioning.

a. Excluding only actual delays will not "greatly complicate" (U.S. Br. 36) trial courts' administration of the Act. Determining whether a motion will result in delay is typically simple at the time of its filing. Some pretrial motions (for example, unopposed

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[9] The Government advances two other administrability arguments, but each is based on a misapprehension of the Sixth Circuit's holding and that are not implicated by respondent's position here. First, the Government argues that defining "delay" strictly according to whether a district court changes a previously set trial date would be overly formalistic. U.S. Br. 36. Respondent does not advocate such a definition. Second, the Government contends that "[r]equiring individualized determinations whether a particular motion actually caused or threatened postponement of the trial would also 'force courts to resolve intractable causation issues'" because it would require courts to decide how much of a given delay was attributable to the pendency of a motion, as opposed to other proceedings. U.S. Br. 37 (citation omitted). As explained above, however, respondent's interpretation of Subsection (D) does not require such analysis. *See supra* at 21-22.

motions for the separation of witnesses or joint motions to set a pretrial conference date), are so administrative in nature and so clearly will not consume anyone's time that it will be obvious to all that pretrial preparations can continue uninterrupted. Other motions (for example, motions to suppress or other motions requiring evidentiary hearings) will plainly consume the parties' and trial court's time, and thus it will be apparent from the time they are filed that they will result in delay.

A trial court can further assist the parties in tracking the speedy trial clock by noting on the record, as was done in the case, whether the motion will result in delay. JA 145 (telling parties that the motion would "not . . . delay trial"). Indeed, since the Sixth Circuit decided this case, district courts have shown themselves perfectly willing and able to make such prospective determinations. *See, e.g.*, *United States v. Gump*, No. 3:10-CR-94, 2010 WL 3655981, at *2 (E.D. Tenn. Sept. 14, 2010) (finding "that the Defendants' motion is of such a nature that the time required to determine the issues creates excludable time" because "[t]he Court will need time to hear and rule upon the motion"); *United States v. Sutton*, No. 3:09-CR-139, 2009 WL 5196592, at *1 (E.D. Tenn. Dec. 22, 2009) (same); *United States v. Jerdine*, No. 1:08-CR-481, 2009 WL 4906564, at *5 (N.D. Ohio Dec. 18, 2009) (same); *United States v. Mayes*, No. 3:09-CR-129, 2009 WL 4784000, at *1 (E.D. Tenn. Dec. 8, 2009) (same). Parties likewise can eliminate any doubts regarding the speedy trial clock by entering into stipulations regarding whether the time during which a motion is pending will be excluded.

In any event, the Government is simply wrong that parties and the court "*must* be able to know, as each day passes, whether that day counts toward the 70-day deadline for commencing trial." U.S. Br. 34-35 (emphasis added). District and appellate courts already routinely make retrospective determinations concerning the speedy trial clock, and properly so. Subsection 3161(h)(1)(F), for instance, excludes time beyond ten days for transportation relating to competency hearings only if such delay is "[r]easonable." This reasonableness standard obviously requires post hoc determinations. *See, e.g.*, *United States v. Dehart*, No. 3:10-250, 2010 WL 4363012, at *2-3 (M.D. Tenn. Oct. 27, 2010). Subsection 3161(h)(1)(H) also requires retrospective determinations. It excludes delay relating to proceedings being taken under advisement only when the delay was "reasonably attributable" to such proceedings. The same type of inquiry is possible here. When necessary, trial courts can determine retrospectively whether the pretrial motions resulted in delay. *See, e.g.*, *United States v. Johnson*, 09-20264, 2010 WL 779284, at *6 (E.D. Mich. Mar. 8, 2010) (finding that defense counsel's motion to withdraw had resulted in delay because "the defendant had asked [defense counsel] not to do anything on the case because the defendant wanted a new lawyer").

The dismissal provision of the Act removes any remaining doubt that Congress anticipated – and accounted for – the fact that parties would sometimes harbor uncertainty regarding the Act's clock at any given moment and that courts would sometimes be required to make retrospective determinations

concerning whether certain periods of time were excluded. Under the Act's dismissal provision, courts may dismiss indictments for violations of the Act "with or without prejudice." 18 U.S.C. § 3162(a)(1). In making such determinations, district courts must weigh "the seriousness of the offense; *the facts and circumstances of the case which led to the dismissal*; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." *Id.* (emphasis added). This weighing process overwhelmingly yields dismissals without prejudice.[10]

Of particular import here, courts typically hold that dismissal without prejudice is appropriate when the Government reasonably believed that the Act's 70-day time period had not expired. *See, e.g., United States v. Cano-Silva*, 402 F.3d 1031, 1036 (10th Cir. 2005) (dismissal without prejudice proper when violation is "inadverten[t]"). And "[w]hen an indictment is dismissed without prejudice, the prosecutor may of course seek – and in the great majority of cases will be able to obtain – a new indictment, for even if 'the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned . . . within six calendar

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[10] For example, from July 1, 1991, to September 30, 1998, 144 of the 177 Speedy Trial Act dismissals in federal courts for violations of the 70-day limit were without prejudice, a rate of 81%. See Judicial Business of the United States Courts, Report of the Director, Administrative Offices of the United States, Table 10 (1992-93) and Table S-13 (1994-98). The Report no longer compiles Speedy Trial dismissals, so more current data is unavailable.

months of the date of the dismissal.'" *Zedner*, 547 U.S. at 499 (quoting 18 U.S.C. § 3288).

This state of affairs cannot be squared with the Government's description of the Act. If the Government were correct that parties must always know, as each day passes, whether that day counts toward the Act's 70-day deadline for commencing trial, prosecutors would almost always know ahead of time whether they were violating the Act. As a result, practically all violations would be willful, and it would be hard to see why many, if any, cases should be dismissed without prejudice. *See Cano-Silva*, 402 F.3d at 1036 (dismissal with prejudice appropriate when violation is "intentional"); *United States v. Moss*, 217 F.3d 426, 435 (6th Cir. 2000) (Gilman, J., concurring in the judgment) (dismissal with prejudice was appropriate because of a "truly egregious and inexplicable violation of the Act"). Yet the relative rarity of such dismissals underscores that the Government usually is not aware of the speedy trial clock's expiration and that the Act's overall regime expressly accounts for this reality.

b. Far from being necessary for the orderly implementation of the Act, the Government's categorical rule would frustrate the Act. It is important to remember that the purpose of the Act is not, as the Government's brief suggests, to provide a counting mechanism untethered to any ultimate goal. Rather, the Act's purpose is to provide a statutory deadline in order to "vindicate the public interest in the swift administration of justice" by "ensuring speedy trials." *Bloate*, 130 S. Ct. at 1355-56; *see also supra* at 10-11. The exclusion of time during which pretrial motions are pending that everyone knows

will not postpone preparations for trial would frustrate the Act's true purpose. Worse yet, it would invite the Government to manipulate the speedy trial clock.

i. As this case illustrates, excluding the time during which mundane pretrial motions are pending would frustrate the Act's goal of speedy trials. Here, there is no question that if no pretrial motions had been filed in the days leading up to respondent's trial, the Act's clock would have expired before trial commenced. The Government's argument, therefore, depends on the proposition that by filing two unopposed, administrative motions that did not in any way impede the parties' preparation for trial or consume any judicial resources, Pet. App. 20a, it tolled the speedy trial clock. This makes no sense. The purpose of the Act's exclusions is to toll the clock when proceedings occur that postpone the time at which a trial could start. If, as here, there is "an obvious understanding of the parties and the court" that the proceedings (here, the Government's two motions) clearly fail to do that, Pet. App. 20a, the Act should not exclude any time relating to them.

Appreciating this point is necessary to faithfully implement the Act not only under the circumstances here, but also in the similar situation when the trial court tables a pretrial motion for resolution, if necessary, during trial. In the tabling scenario, the federal courts of appeals have held that the speedy trial clock continues to run while the motions are pending. *See United States v. Gambino*, 59 F.3d 353, 359 (2d Cir. 1995); *United States v. Clymer*, 25 F.3d 824, 830 (9th Cir. 1994). As the Second Circuit has explained, "Congress envisioned that the speedy trial

clock be tolled when the expenditure of judicial resources to decide the motion would interfere with the case expeditiously proceeding to trial, and not tolled when" the motion "does not [a]ffect a trial court's ability to proceed." *Gambino*, 59 F.3d at 359. Thus, when a pretrial motion does not "consume the court's time and attention" prior to trial, it does not give rise to excludable time. *Id.*; *see also Clymer*, 25 F.3d at 830 (time while motion is pending excluded "only when [delay] in some way results from the pendency of the motion"). Yet if the Government were correct that Subsection (D) categorically excludes "the 'period of time' between the filing of the motion and its disposition" (U.S. Br. 18), then every time a court tabled a motion, Subsection (D) would exclude the entire period of time from the filing of that motion to the beginning of trial. This would thwart the Act's speedy-trial goal by excluding time even though the proceeding "does not [a]ffect a trial court's ability to proceed." *Gambino*, 59 F.3d at 359.[11]

[11] In its reply brief in support of certiorari, the Government tried to distinguish the tabling scenario from this case by arguing that when a district court tables a pretrial motion until trial, the court "[i]n effect . . . denie[s] the motion without prejudice," resubmitting it at trial. U.S. Reply Br. 4 (quotation and citation omitted). This assertion finds no support in reality. When a motion is tabled, it is *not* denied; it is taken under advisement for resolution at a later date. Thus, if a court grants a previously tabled motion, it simply grants the motion; it does not grant a motion for reconsideration of a denial of the original motion. At any rate, the Government's previous argument contravenes the argument it now makes that Subsection (D) "precisely defines the starting and ending points" of the time

ii. Worse yet, excluding all time during which a pretrial motion is pending, regardless of whether that motion results in delay, would enable busy federal prosecutors to file pretrial motions as pretexts to toll the speedy trial clock. Criminal litigation raises a multitude of evidentiary and other issues that are amenable to written pretrial motion practice, but that also can be fully dealt with, as necessary, through oral motions as the issues arise at trial. Under the Government's rule, every time the Government decides to file a written pretrial motion regarding an issue that could have been handled orally at trial, the filing, no matter how needless, would stop the speedy trial clock. This categorical rule would provide the Government with a ready means of stopping the speedy trial clock whenever it felt itself falling behind in its duty to push the case to trial.[12]

Recognizing this problem, some courts have refused to exclude time during the pendency of filings that are "part of a Government attempt to frustrate

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that must be excluded relating to pretrial motions as "the filing of the motion and its disposition." U.S. Br. 17-18.

[12] The Act provides for sanctions for government lawyers who file certain motions "solely for the purpose of delay." 18 U.S.C. § 3162(b)(2). But the Act does so only when a motion is "without merit." *Id.* The problem with filing a pretrial motion regarding a matter that should be handled orally at trial is not that the motion lacks merit; it is that the motion is so simple and so obviously *has* merit that it is unnecessary to file in advance of trial. Thus, the only possible way to deal with the problem that the Government's position raises is by properly construing Subsection (D) itself.

the operation of the Speedy Trial Act." *United States v. Hood*, 469 F.3d 7, 10 (1st Cir. 2006); *see also United States v. Brown*, 285 F.3d 959, 962 (11th Cir. 2002) ("If the government could extend the seventy-day period merely by filing a request to set a trial date," there would be "no teeth in the Speedy Trial Act."). But even assuming such a subjective backstop is susceptible of consistent application, it is incompatible with the Government's categorical rule that the filing of any motion automatically tolls the speedy trial clock. Even more to the point, such a judicially created doctrine is unnecessary to address the problem of filing pro forma motions in order to stop the speedy trial clock. The plain text of Subsection (D) already avoids this problem by refusing to exclude time during the pendency of pretrial motions that do not consume any time or require postponement of trial.

II. The Act Does Not Exclude Time Beyond Ten Calendar Days During Which Respondent Was Transported For His Competency Examinations.

While the Speedy Trial Act excludes "delay resulting from transportation of any defendant . . . to and from places of examination," "any time consumed in excess of *ten days* from the date [of] an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable." 18 U.S.C. § 3161(h)(1)(F) (emphasis added). The Sixth Circuit held (Pet. App. 13a), and the Government did not dispute in its petition or reply brief in support of certiorari, that this ten-day limitation applies to

examinations to assess the defendant's competency. Yet here 20 days passed from the order designating respondent for his first competency examination to his arrival at the facility. Pet. App. 14a. Further, the government has never argued that the extra time it took to perform this task was reasonable.

As a general rule, the various time periods specified in the Speedy Trial Act count *calendar* days. *See, e.g., Henderson*, 476 U.S. at 323 (counting 70 calendar days from arraignment to trial under 18 U.S.C. § 3161(c)(1)); *United States v. Rojas-Contreras*, 474 U.S. 231, 236 (1985) (counting 30 calendar days under 18 U.S.C. § 3161(c)(2)). And the common-law rule with respect to computing statutory time periods in excess of seven days is that "Saturdays, Sundays, or holidays . . . will not be excluded, in the absence of an express proviso for their exclusion." 74 Am. Jur. 2d *Time* § 22 (2001) (collecting authorities).[13] Accordingly, several courts have interpreted or applied Subsection (F) as providing that more than ten *calendar* days relating to transportation is presumptively unreasonable and thus would have held that the 20 day delay in transporting respondent for his competency

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[13] The reasoning behind this rule is that where a statutory time period is more than one week, "the time stipulated must necessarily include one or more Saturdays, Sundays, or holidays," so it is assumed in that case that the drafters envisioned counting weekends and holidays. 74 Am. Jur. 2d Time § 22. By contrast, where a time period is less than a week, it may or may not capture weekends or holidays, so those days are excluded to ensure that actors have a sufficient number of working days to complete the task.

evaluation resulted in ten nonexcludable days accruing. *See United States v. Collins*, 90 F.3d 1420, 1427 (9th Cir. 1996); *United States v. Noone*, 913 F.2d 20, 25 (1st Cir. 1990); *United States v. Castle*, 906 F.2d 134, 137 (5th Cir. 1990); *United States v. Williamson*, 409 F. Supp. 2d 1105, 1108 (N.D. Iowa 2006).

The Sixth Circuit, however, held that Subsection (F) incorporates the methods for counting days set forth in Federal Rule of Criminal Procedure 45(a). *See* Pet. App. 14a. Although that Rule currently provides that all time periods are counted in calendar days (and thus, even if it applies, would simply reinforce the calendar-day counting method here), Rule 45(a), at the time of the pretrial proceedings here, excluded weekend days and holidays in computing any period of time specified in "th[e] rules [of criminal procedure], any local rule, or any court order" that was less than 11 days. In the Sixth Circuit's view, former Rule 45(a) temporarily "enlarged" the ten-day limitation in Subsection (F), *United States v. Bond*, 956 F.2d 628, 632 (6th Cir. 1992), *cited in* Pet. App. 14a, such that only the two days in excess of the first eighteen days (ten weekdays, six weekend days, and two holidays) it took to transport respondent for his first competency evaluation were nonexcludable under the Act. Pet. App. 14a.[14]

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[14] Other courts have issued similar holdings. *See United States v. McGhee*, 532 F.3d 733, 738 (8th Cir. 2008); *United States v. Garrett*, 45 F.3d 1135, 1140 n.6 (7th Cir. 1995).

The Sixth Circuit's holding is incorrect. The text and structure of Subsection (F), as well as former Rule 45(a), make clear that Subsection (F) has always counted ten *calendar* days. And all other sources of statutory insight buttress this conclusion.

A. The Text And Structure Of Subsection 3161(h)(1)(F) And Federal Rule Of Criminal Procedure 45(a) Dictate That Subsection (F) Counts Calendar Days, Not Merely Business Days.

1. Subsection (F) provides that all time "in excess of ten days" relating to transportation for competency hearings is presumptively nonexcludable. This text, especially against the background of the common law and the calendar-day counting norm in the Act, is plain on its face: all transportation time in excess of ten calendar days is nonexcludable when, as here, the the extra time that the government took to conduct the transportation was unreasonable.

Indeed, this Court has emphasized that the subsections in Section 3161(h)(1) provide "detailed"

Some courts also have cited Rule 45(a) in holding that when the 70th day of the speedy trial clock falls on a weekend day or holiday, the last day of the clock does not fall until the next weekday. *See, e.g., United States v. Vickerage*, 921 F.2d 143, 147 (8th Cir. 1990). It is unnecessary, however, to resort to Rule 45(a) to reach this conclusion. The default rule under the common law is that "when an act is to be performed within a certain number of days, and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation." *Monroe Cattle Co. v. Becker*, 147 U.S. 47, 56 (1893). Nothing in the Speedy Trial Act deviates from this rule.

rules that "comprehensively regulate[] the time within which a trial must begin." *Zedner*, 547 U.S. at 497, 500. Consequently, when a provision of the Act does not expressly exclude certain days, the proper inference is that this omission was deliberate and that the days count toward the Act's 70-day limit. *See id.* at 500 (drawing this inference); *Bloate*, 130 S. Ct. at 1353 (same); *Rojas-Contreras*, 474 U.S. at 239-40 (Blackmun, J., concurring in the judgment) ("[T]he Act's comprehensive list of express exclusions counsels one to read Congress' failure to exclude certain periods of time as a considered judgment that those periods are to be included in the speedy-trial calculation . . . ."). Here, nothing in Subsection (F)'s ten-day limitation restricts itself to "working days" or "business days." Nor does it exclude "weekends" or "holidays" or include any reference to Rule 45(a). The Sixth Circuit, therefore, had no basis for holding that former Rule 45(a) somehow temporarily "enlarged" Subsection (F)'s ten-day limitation to exclude weekends and holidays.

Comparing Subsection (F)'s ten-day limitation with similar provisions in other federal statutes confirms this conclusion. The Bail Reform Act, for instance, allows a court, under certain circumstances, to temporarily detain a defendant for "a period of not more than ten days." 18 U.S.C. § 3142(d)(2). Yet, unlike Subsection (F) of the Speedy Trial Act or any other provision of that Act, this time limitation in the Bail Reform Act expressly provides immediately following the number of days specified that the period "exclud[es] Saturdays, Sundays, and holidays." 18 U.S.C. § 3142(d)(2); *see also id.* § 3142(f) (providing that another five-day period in Bail Reform Act does "not includ[e] any intermediate Saturday, Sunday, or

legal holiday"). Numerous other statutes outside of the realm of criminal procedure likewise expressly exclude weekends and holidays from time periods of ten days or longer. *See, e.g.*, 3 U.S.C. § 425(c)(3)(A) (fifteen-day time period in which to seek review of administrative decision in OSHA case); 5 U.S.C. § 552a(d)(2)(A) (ten-day period to request records under Administrative Procedures Act); 5 U.S.C. § 1221(c)(2) (ten-day period to grant stay in administrative proceedings before federal Merit Systems Protection Board); 8 U.S.C. § 1231(c)(3)(A)(i)(III) (fifteen-day period for detaining and maintaining an alien on a vessel or aircraft).

By contrast, numerous other statutes (both inside and outside of the realm of criminal procedure) set forth ten-day time periods without excluding weekends or holidays. *See, e.g.*, 18 U.S.C. § 2518(9) (ten-day period before trial for disclosing applications and court orders authorizing wiretaps); 18 U.S.C. § 4114(a) (ten-day period for notifying foreign country of rejection of prisoner transfer); 18 U.S.C. § 4244(a) (ten-day period after conviction for filing motion requesting treatment of mental disease or defect in a suitable facility); 8 U.S.C. § 1324b(b)(1) (ten-day period for service of charges of unfair immigration practices).

The lesson is clear: when Congress wants to exclude weekends and holidays from ten-day time periods governing administrative or trial procedure, it knows how to do so and does so explicitly. When, by contrast, Congress simply specifies a period of ten days, the statute requires courts to count a certain number of calendar days.

2. Even if it were appropriate to look beyond the U.S. Code in construing and applying Subsection (F),

the text of former Rule 45(a) provided no basis for temporarily foisting its method of counting upon that Subsection. Former Rule 45(a) instructed that its counting method applied "in computing any period of time specified in these rules, any local rule, or any court order." Fed. R. Crim. P. 45(a) (2008). Conspicuously absent from this list was any indication that Rule 45(a) applied to statutes. This omission must be deemed dispositive. Under the venerable canon of *expressio unius est exclusio alterius*, the omission of a thing or idea from a legal provision dictates its exclusion "when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) (quoting *State ex rel. Curtis v. De Corps*, 16 N.E.2d 459, 462 (1938)); *see also, e.g., Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (employing this canon to a federal rule of procedure).

Such is the case here. Any draftsperson stating that a provision applied to rules or court orders would no doubt have considered whether the provision should also apply to statutes. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (emphasizing the difference between a regulation and statute as a source of law). The fact that Rule 45(a) left "statutes" off of its list of specified sources of law indicates that it was not meant to apply to statutes. *See Williamson*, 409 F. Supp. 2d at 1107 n.1 (drawing this conclusion).

If the drafters of former Rule 45(a) had intended it to apply to any statutes, the Federal Rules Civil, Appellate, and Bankruptcy Procedure 6(a) confirm that they would have said so expressly. Those rules set forth the methods of "computing any time period specified in these rules, in any local rule or court order, *or in any statute* that does not specify a method of computing time." Fed. R. Civ. P. 6(a) (emphasis added); *see also* Fed. R. App. P. 26(a) (same); *see also* Fed. R. Bank. P. 9006(a) (same). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Kucana v. Holder*, 130 S. Ct. 827, 838 (2010) (quoting *Nken v. Holder*, 129 S. Ct. 1749, 1759 (2009)); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) (This Court should "refrain from concluding . . . that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship."); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (same). The same holds true with respect to the federal rules of procedure. The Sixth Circuit thus erred in interpreting Criminal Rule 45(a) as though it read like Civil Rule 6(a), Appellate Rule 26(a), and Bankruptcy Rule 9006(a).

B. Other Sources Of Statutory Insight Reinforce That Subsection (F) Counts Calendar Days.

The amendment history of Rule 45(a), the Speedy Trial Act's purpose, and the Rules Enabling Act's prohibition against rules of procedure changing the

meaning of federal statutes all buttress the conclusion that former Rule 45(a) did not temporarily enlarge Subsection (F)'s ten-day limitation beyond ten calendar days.

1. Legislative History

Rule 45's subsequent amendment history demonstrates that former Rule 45(a) did not apply to statutes, such as Subsection 3161(h)(1)(F) of the Speedy Trial Act.

In 2007, the Time Computation Subcommittee of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed amending the various rules of federal procedure to cease excluding weekends or holidays from any time periods governed by those rules. In doing so, the Subcommittee also explicitly noted that unlike its counterparts in the Civil, Appellate, and Bankruptcy Rules, "Criminal Rule 45(a) does not currently encompass statutory time periods." Memorandum from Time Computation Subcommittee to Committee on Rules of Practice and Procedure 3 (June 29, 2007); *see also id.* at 7 (noting that Rule 45(a) did not "apply to statutory periods").[15] The Subcommittee recommended amending Criminal Rule 45 to apply to such periods. *Id.*

In 2009, the Subcommittee's recommendations were carried out, adopting a pure calendar-days approach for all of the federal rules and amending

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[15] The memo is available at: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0807/07_7_5_time_comp.pdf.

Criminal Rule 45 to apply to periods of time in any "statute that does not specify a method of computing time." In the Advisory Committee Notes that accompany this amendment, the Committee explained that the purpose of the latter change was to "mak[e] [Criminal Rule 45's] time computation rules applicable to statutory time periods." Fed. R. Crim. P. 45 advisory committee's note. This change having been made, the Committee explained, Criminal Rule 45(a) "is consistent with Civil Rule 6(a)." *Id.*

Congress followed these changes by reinforcing that it had always intended Subsection 3161(h)(1)(F) to count calendar days. In the Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, Congress amended twenty-eight (mostly civil) statutory time periods across the U.S. Code to explicitly exclude weekends or holidays or to lengthen short time periods. The Act, however, did not touch Subsection 3161(h)(1)(F). Had Congress previously understood Subsection (F) to exclude weekends and holidays, it surely would have amended it to continue doing so. That Congress left that provision alone, while amending others, shows that it has always counted calendar days.

2. Purpose

The inapplicability of former Rule 45(a)'s counting method to the Speedy Trial Act makes good sense. Time is simply of the essence in criminal cases in ways that it is not in civil cases. When people who are presumed innocent are detained against their will and their future liberty is at stake, proceedings must progress as expeditiously as possible. Any

statutes that purport to relieve the Government or courts of this obligation must be construed strictly. Accordingly, it was perfectly understandable that former Criminal Rule 45(a) did not apply to statutory time periods, whereas Civil Rule 6(a) did.[16] Indeed, it is telling that Rule 45(a) ceased excluding weekends or holidays only when the Rule was also amended to apply to certain statutory time periods.

3. The Rules Enabling Act

This Court should resolve any uncertainty over whether Subsection (F)'s ten-day rule incorporated former Rule 45(a) against such incorporation because it would violate the Rules Enabling Act.

The Rules Enabling Act (REA) provides that this Court has "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals," provided that "[s]uch rules *shall not abridge, enlarge or modify any substantive right.*" 28 U.S.C. § 2072(a)-(b) (emphasis added). As this Court has summarized this proviso, a given application of a rule of procedure violates the REA and thus cannot be enforced "if it alters the rules of decision by which [the] court will adjudicate [a litigant's] rights." *Shady Grove Orthopedic Assocs.,*

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[16] Implicitly recognizing the limited applicability of former Rule 45(a), this Court applied it exclusively to other rules and never to any statutory time period. *See, e.g., Berman v. United States,* 378 U.S. 530 (1964) (applying Rule 45(a) to a filing deadline in a district court).

P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (plurality opinion) (first alteration in original) (quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 446 (1946) (internal quotation marks omitted)).

Incorporating former Rule 45(a) into the Act here would violate the REA because the Act does not reference the Rule and – in the Sixth Circuit's own words, *see Bond*, 956 F.2d at 632 – the Rule would "enlarge[]" the time within which a defendant must be tried. In other words, the Act gives defendants a right to be tried within 70 days of indictment and specifies that, absent circumstances not alleged here, that deadline may not be tolled by more than ten days for transportation to a competency examination. This 70-day deadline cannot be understood as anything other than a substantive right; it is the very heart of the Act. Accordingly, it would violate the REA to incorporate former Rule 45(a) into the Speedy Trial Act in order to give the Government and courts more time than they otherwise had to bring a defendant to trial.[17]

III. The Act Does Not Exclude The Time Beyond Thirty Days That It Took To Conduct Respondent's Competency Examinations.

Subsection 3161(h)(1)(A) of the Act provides that "delay resulting from . . . examinations, to determine the mental competency . . . of the defendant" should

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[17] Recall that current Rule 45 no longer excludes holidays and weekends from any time periods, so even if the Rule now applies to the Speedy Trial Act, it would not violate the Rules Enabling Act.

be excluded from the speedy trial clock. Another federal statute, 18 U.S.C. § 4247(b), limits the period in which these evaluations may be completed to 30 days, subject only to an extension of time for "good cause." Yet it took over four months to conduct respondent's first competency evaluation and nearly two months to conduct his second one. Although the Government initially asserted the respondent was not cooperating with the effort to evaluate him, JA 108, it never provided any justification for the bulk of the delay, other than asserting without elaboration in a second motion for an extension of time that the facility needed additional time to do its job, JA 114. The Sixth Circuit nevertheless excluded all of the time while respondent was waiting to be evaluated, holding that Section 4247(b) "does not limit the time period for a competency examination with respect to calculations under the Speedy Trial Act." Pet. App. 11a-12a (quoting *United States v. Murphy*, 241 F.3d 447, 456 (6th Cir. 2001)).

This holding is not only incorrect but is incompatible with the Sixth Circuit's other holding that the Speedy Trial Act did incorporate the counting rule in former Fed. R. Crim. P. 45(a).

1. It is a fundamental principle of statutory construction that different statutes which relate to the same subject matter – that is, statutes *in pari materia* – should be construed together, "as if they were one law." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (quoting *United States v. Freeman*, 44 U.S. (3 How.) 556, 564 (1845)). This is especially so where a subsequent statute falls "within the reason of [the] former statute" – that is, where

both statutes are designed to effectuate the same goal. *Freeman*, 44 U.S. at 564.

Both Section 4247(b) and Subsection (A) relate to the same subject matter – namely, the timing of competency examinations. Furthermore, the two provisions share the same objective: to make pretrial proceedings involving such examinations as expeditious as possible. Indeed, Section 4247(b) underscores that objective by requiring that competency examinations be conducted not only within 30 days but also that they be conducted "in the suitable facility closest to the court." Accordingly, the 30-day requirement set out in Section 4247(b) limits the period of "delay" that the Speedy Trial Act contemplates competency evaluations will cause. Congress could hardly have intended to exclude days used for the illegal detention of defendants for competency proceedings.

2. At the very least, the Sixth Circuit's decision to incorporate former Fed. R. Crim. P. 45(a) into Subsection 3161(h)(1)(F)'s transportation rule, while at the same time refusing to incorporate Section 4247(b) into Subsection 3161(h)(1)(A)'s competency evaluation rule, cannot be correct.

It is logically possible that neither of these two provisions outside of the Speedy Trial Act should be read into the Act. But if the Act incorporates only one of the two provisions, it must be Section 4247(b). Rule 45(a) is not a federal statute; it is a mere court rule. Moreover, the text of former Rule 45(a) shows that it did not apply to the Speedy Trial Act or any other statute. By contrast, Section 4247(b) is a federal statute dealing with the same subject matter, and sharing the same goal, as its counterpart in the

Speedy Trial Act. And nothing in Section 4247(b) suggests that its counting rule should not be incorporated into the Act.

In short, if the Speedy Trial Act does not incorporate the counting rule Section 4247(b), then there the Sixth Circuit had no basis whatsoever for incorporating the counting rule in former Criminal Rule 45(a). That reality is enough to affirm the decision below.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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APPENDIX

APPENDIX A

INSANITY DEFENSE REFORM ACT – RELEVANT PROVISION

18 U.S.C. § 4247(b) provides in pertinent part:

"(b) Psychiatric or psychological examination. A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245, 4246, or 4248 [18 USCS § 4245, 4246, or 4248], upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245 [18 USCS § 4241, 4244, or 4245], the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, 4246, or 4248 [18 USCS § 4242, 4243, 4246, or 4248], for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245 [18 USCS § 4241, 4244, or 4245], and not to exceed thirty days under section 4242, 4243, 4246, or 4248 [18 USCS § 4242, 4243, 4246, or 4248], upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant."

APPENDIX B

FEDERAL RULE OF CRIMINAL PROCEDURE 45(a)

CURRENT VERSION EFFECTIVE DECEMBER 1, 2009

(a) Computing Time.

The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) Period Stated in Days or a Longer Unit.
When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) Period Stated in Hours.
When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) Inaccessibility of the Clerk's Office.
Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 45(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 45(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) "Last Day" Defined.
Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) "Next Day" Defined.
The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) "Legal Holiday" Defined.
"Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial

Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

FEDERAL RULE OF CRIMINAL PROCEDURE 45(a)

PRIOR VERSION EFFECTIVE THROUGH NOVEMBER 30, 2009

(a) Computing Time.
The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

(1) **Day of the Event Excluded.** Exclude the day of the act, event, or default that begins the period.

(2) **Exclusion from Brief Periods.** Exclude intermediate Saturdays, Sundays and legal holidays when the period is less than 11 days.

(3) **Last Day.** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(4) **"Legal Holiday" defined.** As used in this rule, "legal holiday" means:

(A) the day set aside by statute observing:

(i) New Year's Day;
(ii) Martin Luther King, Jr.'s Birthday;
(iii) Washington's Birthday;
(iv) Memorial Day;
(v) Independence Day;
(vi) Labor Day;

(vii) Columbus Day;
(viii) Veterans' Day;
(ix) Thanksgiving Day;
(x) Christmas Day; and

(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.

REPLY BRIEF

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Supreme Court, U.S.
FILED
FEB 14 2011
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No. 09-1498

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JASON LOUIS TINKLENBERG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

As respondent concedes (Br. 13), for more than three decades, the courts of appeals had uniformly followed a clear, administrable rule: the exclusion in 18 U.S.C. 3161(h)(1)(D) from the deadline for commencing trial under the Speedy Trial Act of 1974 (STA or Act), 18 U.S.C. 3161 *et seq.*, applies automatically upon the filing of any pretrial motion, regardless of its effect on the trial schedule.[1] The court below incorrectly departed from that longstanding consensus, holding that a "motion must actually cause a delay, or the expectation of a delay, of trial in order to create excludable time." Pet. App. 16a. Like the court below, respondent contends that a motion creates excludable time only if it affects the trial schedule. Under respondent's test, however, the critical question is not whether the mo-

[1] All references to 18 U.S.C. 3161(h)(1)(D) are to Supplement III (2009) to the 2006 United States Code.

tion requires or threatens postponement of the *actual* trial date; instead, the question is whether the motion would require postponement of some *hypothetical* earliest "possible" trial date. Br. 16 & n.5. Respondent's standard conflicts with the STA's text, structure, and legislative history; departs from this Court's decisions; and is entirely unworkable. Although respondent advances two alternative grounds to defend the judgment, each lacks merit and does not warrant this Court's consideration. The Court should therefore reverse the decision below.

I. SECTION 3161(h)(1)(D) AUTOMATICALLY EXCLUDES THE TIME BETWEEN THE FILING OF ANY PRETRIAL MOTION AND ITS DISPOSITION

Respondent offers shifting formulations of when a motion creates excludable time. Sometimes he states that the motion must "require trial to begin later than would otherwise be possible." Br. 16. Other times, he states that it must either "postpone when trial could begin" or "hinder pretrial preparations." Br. 13. Occasionally, respondent appears to advocate a superficially bright-line rule that "[u]nopposed, mundane, administrative motions" are not excluded. Br. 17. But carving a category of motions out of the exclusion would be inconsistent with its text, which states that it applies to "any" pretrial motion. 18 U.S.C. 3161(h)(1)(D). And respondent provides only a circular definition of "mundane, administrative motions," describing them as motions that do not postpone when trial could begin because "they do not impede any party's preparation for trial or consume any judicial resources to resolve." Br. 17. Thus, at bottom, respondent's formulations all require that a motion have "postponed or hindered when trial could begin." Br. 22. And "when trial could begin" is not the scheduled trial date but instead a hypothetical earliest

"possible" trial date. Br. 16-17 & n.5 (stating test as whether motion "would have required trial to be postponed had it been scheduled earlier").

A. The Statutory Text Supports The Established Rule That Any Pretrial Motion Creates Excludable Delay

1. Respondent attempts to ground his standard in the statutory text, arguing that because Section 3161(h)(1)(D) excludes "delay resulting from" pretrial motions, and "delay" must refer to "[t]he period during which something is postponed or slowed," "[t]here is no conceivable way * * * to exclude the time during which a pretrial motion [i]s pending unless the motion postponed, or slowed preparation for, trial." Br. 14-15 (brackets in original; citations omitted). But Section 3161(h)(1)(D) does not identify the relevant "delay" as delay of the "trial." And respondent's definition of "delay" as the postponement or hindering of trial makes no sense in light of the full text of Section 3161(h)(1)(D).

The statute provides:

> (h) The following *periods of delay shall be excluded* in computing the time within which * * * trial * * * must commence:
>
> > (1) Any *period of delay* resulting from other proceedings concerning the defendant, including but not limited to—
> >
> > * * *
> >
> > (D) *delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.*

18 U.S.C. 3161(h)(1)(D) (emphasis added). "Delay" should have the same meaning throughout those provisions. But respondent's interpretation makes that impossible.

As respondent acknowledges (Br. 14), the introductory language in Subsections (h) and (h)(1) makes clear that only "periods of delay" are excluded, and the language of Subsection (D) delineates the length of excluded pretrial motions "delay." Respondent defines "delay" as postponement or hindering of trial. Under that definition, the "period of delay" resulting from a motion logically must be the time during which trial is postponed or hindered by the motion. And Subsections (h) and (h)(1) would therefore dictate that only the time by which trial is postponed or hindered is excluded. Respondent concedes, however, that, when the exclusion applies, "the terms of Subsection (D) require a court to exclude the entire time 'from the filing of the motion through the [conclusion of] the hearing on, or other prompt disposition of, such motion.'" Br. 22 (quoting 18 U.S.C. 3161(h)(1)(D)). Respondent's interpretation of "delay" in Subsections (h) and (h)(1) thus contradicts the meaning of "delay" in Subsection (D).

This Court held in *Henderson* v. *United States*, 476 U.S. 321 (1986), and reaffirmed in *Bloate* v. *United States*, 130 S. Ct. 1345 (2010), that excluded pretrial motions delay covers exactly the period described in Subsection (D): the time between the filing of a motion and its disposition. But that period is often longer than the time by which a motion postpones or hinders when trial could begin. Thus, if respondent's definition of delay were correct, Subsection (D) would frequently require the exclusion of more time than Subsections (h) and (h)(1) would permit to be excluded.

For example, a defendant might file a motion 14 days before trial could have begun had the motion not been filed. If 15 days elapsed from the motion's filing to its disposition,

and trial began immediately thereafter, Subsection (D) would require that 15 days be excluded. Under respondent's definition of "delay," however, the "period of delay" resulting from the motion would be only one day, because that is how long trial was postponed or hindered. Subsections (h) and (h)(1) would therefore permit the exclusion of only one day. Respondent's definition of "delay" thus produces irreconcilable results under different portions of the same statute.

To avoid this contradiction, respondent repeatedly describes the statute as if it said: "[I]f a pretrial motion causes delay, * * * exclude the entire time [specified by Subsection (D)]." Br. 22; see also Br. 7, 16, 24. But the statute does not treat "delay" as a trigger for the exclusion, and then specify a separate period of time that is excluded. Instead, the statute equates the "delay" and the excluded period; it states that "periods of delay shall be excluded" and then defines the excluded "delay resulting from any pretrial motion" as the time "from the filing of the motion" through the "disposition of[] such motion." 18 U.S.C. 3161(h)(1)(D).

Even if it were possible to read the statute as respondent proposes, that reading would make little sense. Respondent cannot explain why Congress would have required courts to make the difficult calculation whether a motion postponed when trial could begin, but then commanded them to exclude the entire time the motion was pending, even if that period is much longer than the time by which trial was postponed.

2. Unlike respondent's approach, the established rule that Section 3161(h)(1)(D) automatically excludes the time from the filing of any motion through its disposition reads the statute as a harmonious whole. Under the established rule, the "period of delay" "resulting from any pretrial mo-

tion" is the interval of time "from the filing of the motion" through its "disposition," during which the STA's deadline is postponed because of the motion. 18 U.S.C. 3161(h)(1)(D).

That interpretation accords with a common meaning of the word "delay"—"[t]he interval of time between two events." Pet. Br. 17 (quoting *The American Heritage Dictionary of the English Language* 480 (4th ed. 2006)). Respondent asserts that "delay" can have that meaning only if "the second event begins later than was previously hoped or was possible." Br. 15. That is incorrect. For example, someone might say that there was a "delay" between when he sent an e-mail and when it was received, even though he neither hoped nor anticipated that the e-mail would be received more quickly. Or he might say that there was a "delay" between lightning and thunder, even though he did not hear the thunder any later than he hoped or thought possible.

Moreover, even assuming "delay" generally entails the postponement of some occurrence, that is consistent with the established rule. The occurrence that is postponed is the STA's deadline for commencing trial. And that postponement "result[s] from" the motion because it arises "as a consequence" of the motion's filing. *American Heritage Dictionary* 1487. Respondent erroneously contends that this reading of the statute is "circular" because it purportedly assumes that "the speedy trial clock is already stopped" before a motion is filed. Br. 18 (brackets and citation omitted). On the contrary, the established reading of the statute merely recognizes that the clock stops automatically when a motion is filed. Moreover, unlike respondent's interpretation, the established approach harmonizes all of

the language in Section 3161(h)(1)(D) and provides an administrable rule.[2]

B. This Court's Precedent Supports The Established Rule

The established approach is also supported by *Henderson* and *Bloate*. *Henderson* held that the pretrial motions exclusion is "automatic," 476 U.S. at 327, and excludes "all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary,'" *id.* at 330. *Bloate* reiterated that the exclusion is "automatic" and applies "regardless of the specifics of the case," 130 S. Ct. at 1349 n.1, but held that motions delay "is automatically excludable, *i.e.*, excludable without district court findings, *only* from the time a motion is filed through the hearing or disposition point specified," *id.* at 1353. *Henderson* and *Bloate* thus make clear that, when a motion is filed, Section 3161(h)(1)(D) automatically excludes, without the need for any additional findings, all of the time between the filing of the motion and its disposition.

Respondent's approach conflicts with *Henderson* and *Bloate* in several ways. First, it is inconsistent with the

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[2] Respondent mistakenly argues that the use of the word "any" in Section 3161(h)(1) indicates the "conditional nature" of the exclusion in Section 3161(h)(1)(D). Br. 19. That argument ignores that Subsection (h)(1) refers broadly to "[a]ny period of delay resulting from other proceedings concerning the defendant," which include various proceedings other than pretrial motions. Thus, even assuming the word "any" signals that the exclusion is conditional, its use merely reflects that those various proceedings will not necessarily occur in every criminal case. In all events, Congress likely used the term "any" not to stress the exclusion's conditional nature but instead to stress its expansiveness, *i.e.*, to indicate that *all* periods of delay are excluded regardless of their length or the type of "proceeding[] concerning the defendant" that triggers them. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997).

Court's repeated statements that Section 3161(h)(1)(D) applies automatically once a motion is filed. Under respondent's interpretation, the exclusion applies only if a court finds that the motion required trial to begin later than otherwise possible. Respondent incorrectly contends that *Henderson* and *Bloate* "presume[d] that [Section 3161(h)(1)(D)] excludes time during the pendency of pretrial motions only if the motions postponed when trial could begin." Br. 24-25. On the contrary, *Henderson* held that the time consumed in resolving the motions at issue was "automatically excludable" without considering whether they delayed the start of trial. 476 U.S. at 331-332. Similarly, in *Bloate*, both the Court and the dissent agreed that the request for additional motions preparation time resulted in "delay," 130 S. Ct. 1352-1353; *id.* at 1360 (dissenting opinion), even though nothing in the record indicated that it hindered the commencement of trial, see Pet. Br. 24.

Second, as respondent concedes, *Henderson* and *Bloate* held that, when the pretrial motions exclusion applies, a "court must exclude" the entire "time during which [the motion] was pending." Br. 24. But respondent's interpretation of Section 3161(h)(1)(D) cannot be reconciled with that holding. As discussed above, the textual and logical implication of respondent's definition of "delay" is that only the time by which trial was postponed or hindered should be excluded.

Third, *Henderson* expressly rejected "limiting [the] exclusion to time that is 'reasonably necessary' for the disposition of pretrial motions." 476 U.S. at 328. But respondent's interpretation requires courts to decide how much time is "reasonably necessary" to dispose of a motion before *any* time may be excluded. This case illustrates the point. The disposition of the government's motions took six days: the motion to depose a witness was filed on August 1 and

granted on August 3, and the motion for permission to bring respondent's firearms into the courtroom was filed on August 8 and granted on August 10. Under *Henderson*, a court need not ask if those periods of time were "reasonably necessary." Under respondent's approach, however, none of that time is excluded, because the motions purportedly "d[id] not impede any party's preparation for trial or consume any judicial resources to resolve," Br. 17—in other words, because no time spent resolving the motions was "reasonably necessary." Thus, respondent smuggles back into Section 3161(h)(1)(D) a variant of the "reasonably necessary" analysis that *Henderson* rejected.

C. The Established Rule, Unlike Respondent's Test, Is Clear And Administrable

1. As the government's opening brief explains (at 34-36), the STA cannot operate efficiently and practicably unless the starting and stopping points of the speedy trial clock are clearly defined and easily discernible. If courts and parties cannot determine as each day passes whether it counts towards the deadline for commencing trial, they cannot take the necessary actions to prevent inadvertent violations of the Act.

Respondent's test for when a motion creates excludable time is neither clear nor administrable. To determine the hypothetical earliest date on which trial "would otherwise be possible" (Br. 16), a court would have to make difficult assessments about how multiple different factors affect when trial could begin. The court would have to decide, for example, how much time counsel need for factual investigation and legal analysis, how long discovery will take, and how much time the court itself needs to prepare. The court would also have to evaluate how other commitments of

counsel, the court, and witnesses might affect the trial schedule.

Moreover, numerous questions would arise about how to take those factors into account. Courts would have to decide whether to take potential obstacles to an earlier trial as given or instead to determine if the obstacles might be eliminated. For example, if another scheduled trial would prevent commencing the defendant's trial for two weeks, is the earliest possible trial date in two weeks, or does that depend on whether the other trial could be rescheduled? Courts also would have to decide when to calculate the earliest possible trial date. For example, if on the day a motion is filed, trial could occur in three days, but an unexpected conflict arises the next day and precludes trial for a week, is the earliest possible trial date three days after the motion was filed or a week after? And courts would have to decide how to account for other proceedings that might also generate excludable time. For example, if trial could otherwise begin in five days, and two motions are filed simultaneously, one that will require three days to resolve and another that will require four days, does neither motion create excludable time? Both? Only one? If so, which one?

Respondent's approach would still not be administrable even if it only required a court to consider the motion at issue in isolation and decide whether its resolution would "impede any party's preparation for trial or consume any judicial resources." Br. 17. Every motion consumes at least some time and resources. For example, opposing counsel must evaluate the motion and decide whether to respond, and the court must decide whether to grant or deny it. Thus, whether a motion creates excludable time would necessarily turn on an imprecise determination whether the amount of resources it is likely to consume is small enough that time ought not be excluded. Moreover,

courts would often be unable to make that determination when a motion is filed. It is frequently unclear until later how much time will be needed to resolve a motion or what effect granting it will have on a possible trial date. See Pet. Br. 36-37.

The motions in this case are illustrative. Contrary to respondent's contention, the motions consumed the time and resources of both the parties and the court. For example, after the government filed the motion to depose a witness, the court issued an order requesting a response. J.A. 141-142. In the response, respondent stated that he had been unable to respond until after he and counsel had met to discuss the matter and that he did not oppose the motion but did not want trial delayed. J.A. 143-144. The court issued an order granting the motion the following day, directing the parties to "schedule [the] deposition posthaste so as not to delay trial." J.A. 145. Thus, not only did the motion consume time that respondent, counsel, and the court might otherwise have used to prepare for trial, but when the motion was filed, it was unclear whether respondent would oppose it and thus how much time and resources it would consume. Moreover, even after the court granted the motion, neither the parties nor the court could be certain that events beyond their control (such as the witness's unavailability) would not delay the deposition and thereby delay when trial could begin.

The facts of this case thus undercut respondent's claim that "[d]etermining whether a motion will result in delay is typically simple at the time of its filing." Br. 28. Respondent's contention that trial courts can alleviate the problem by "noting on the record * * * whether the motion will result in delay" is likewise mistaken. Br. 29. Judges cannot make that notation if they are unable accurately to determine whether a motion will result in delay. Moreover, a

trial judge's finding that a motion will cause delay would not conclusively resolve whether it created excludable time. The defendant could challenge the finding in a subsequent motion to dismiss under the STA and on appeal. And, contrary to respondent's contention (*ibid.*), it is far from clear that the parties can eliminate uncertainty about whether a motion creates excludable time by "entering into stipulations" that time will be excluded. Cf. *Zedner* v. *United States*, 547 U.S. 489, 500 (2006) (holding that "a defendant may not prospectively waive the application of the Act"). In any event, in many cases, defendants may be unwilling to stipulate.[3]

Respondent also incorrectly contends (Br. 30) that the existence of a few STA exclusions requiring reasonableness determinations shows that courts and parties have no need to know as each day passes whether it counts towards the STA deadline. As *Henderson* explained, very few exclusions require such determinations. 476 U.S. at 327. And they involve much more manageable analyses than respondent's proposed test for pretrial motions delay, which would

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[3] Amicus NACDL (Br. 5-12) makes the same flawed arguments in arguing that the ruling below will not disrupt the STA's administration. NACDL also argues (Br. 3-5) that courts and litigants in the Sixth Circuit have successfully adjusted to the ruling. But NACDL admits that "many" defense attorneys are still "unaware" of the ruling, which has been in effect only a short time. Br. 3. It is therefore too early to make an accurate empirical judgment about how much disruption it will cause. In any event, many prosecutors inform us that courts have been entering ends-of-justice continuances under 18 U.S.C. 3161(h)(7) (Supp. III 2009) to exclude pretrial motions delay in order to avoid STA violations under the ruling. See also Pet. Br. 26-27 (citing cases). The ruling is thus frustrating Section 3161(h)(1)(D)'s purpose—to provide an automatic exclusion that avoids spending time and resources on case-specific analyses of whether the benefits of delay from each particular motion outweigh the costs.

require courts to assess how countless factors would affect a hypothetical earliest possible trial date. For example, 18 U.S.C. 3161(h)(1)(F), on which respondent principally relies, excludes ten days of time spent transporting a defendant to and from places of examination or hospitalization, plus additional time if "[]reasonable." Courts and parties can avoid violating that provision simply by assuming that only ten days will be excludable. Moreover, if it becomes necessary to determine whether additional transportation time was reasonable, the universe of considerations will be far smaller than the innumerable factors courts would have to consider to divine hypothetical earliest possible trial dates.[4]

Respondent also mistakenly relies (Br. 30-32) on the STA's provisions for dismissing indictments as a sanction for violations. Contrary to respondent's contention, the fact that most dismissals are without prejudice, and that courts sometimes rely on the inadvertent nature of a violation in selecting that form of dismissal, does not show that courts and parties generally do not know in advance whether time is excludable. Whether dismissal is with or without prejudice turns on a number of factors, not simply whether the violation was inadvertent. 18 U.S.C. 3162(a)(1). Moreover, inadvertent violations can occur even if the rules governing the exclusion of time are intended to be precise and prospectively applicable. For example, violations may occur because of arithmetic errors or misun-

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[4] Contrary to respondent's contention (Br. 30), 18 U.S.C. 3161(h)(1)(H) does not require a reasonableness determination. Consistent with *Henderson*'s discussion of the provision, 476 U.S. at 328-329, the courts of appeals have read it as automatically excluding 30 days while a proceeding concerning the defendant is under advisement. *E.g.*, *United* v. *Chalkias*, 971 F.2d 1206, 1211 (6th Cir.), cert. denied, 506 U.S. 926 (1992).

derstandings about the meaning of statutory provisions. In any event, the rarity of dismissals with prejudice provides no reason to interpret the pretrial motions exclusion in a manner that increases complexity and decreases clarity.

2. In contrast to respondent's proposal, the established rule that Section 3161(h)(1)(D) applies automatically upon the filing of any pretrial motion is clear and easily administrable. By "put[ting] [the court and] counsel on notice from the outset as to what is excludable," *United States* v. *Vo*, 413 F.3d 1010, 1015-1016 (9th Cir.), cert. denied, 546 U.S. 1053 (2005), the rule facilitates compliance with the STA while advancing its goal of providing speedy trials without sacrificing the time needed to resolve important pretrial proceedings.

Respondent mistakenly contends that the established rule "makes no sense" because it excludes the time when motions are pending even if their resolution requires only limited resources. Br. 33. Congress reasonably concluded that the cost of excluding that time (which typically is short because the motions can be quickly resolved) is outweighed by the benefits of an administrable exclusion.[5]

Respondent also incorrectly asserts that prosecutors will abuse the automatic exclusion by "fil[ing] pretrial motions as pretexts to toll the speedy trial clock." Br. 35. The automatic exclusion has been the law in virtually every cir-

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[5] Contrary to respondent's contention (Br. 33-34), the automatic exclusion is not inconsistent with the conclusion of some circuits that once a pretrial motion has been tabled until after trial, time is no longer excluded under Section 3161(h)(1)(D). *E.g.*, *United States* v. *Clymer*, 25 F.3d 824 (9th Cir. 1994). As the Ninth Circuit has explained, that conclusion is consistent with the automatic exclusion because, in tabling the motion, "the district court" has, for all practical purposes, "denied the motion without prejudice to the filing of a renewed submission after the conclusion of the trial." *Id.* at 829-830; see *Vo*, 413 F.3d at 1015.

cuit for more than three decades. Yet respondent points to no evidence that prosecutors have engaged in any abuse. Neither case cited by respondent (Br. 36) supports that suggestion. *United States* v. *Hood*, 469 F.3d 7 (1st Cir. 2006), involved a motion filed by defense counsel, not the government, and the court held that the pretrial motions exclusion applies equally to "significant or complex 'pretrial motions' and simple or routine motions." *Id.* at 10 (citation omitted). *United States* v. *Brown*, 285 F.3d 959, 961 (11th Cir. 2002), merely held that "a reminder to the court to set a timely trial date" was not a "pretrial motion" within the meaning of Section 3161(h)(1)(D). Moreover, in the unlikely event that a prosecutor filed a motion solely to extend the STA deadline and avoid proceeding to trial, that conduct would be sanctionable. See 18 U.S.C. 3162(b)(4) (providing for sanctions when an attorney "otherwise willfully fails to proceed to trial without justification").

D. The STA's Stucture And Legislative History Support The Established Rule

Respondent's reading of Section 3161(h)(1)(D) also conflicts with the STA's structure and legislative history. Respondent concedes that the statutory structure indicates that "a district court applying [Section 3161(h)(1)(D)] should not conduct any reasonableness analysis or otherwise make findings concerning the ends of justice." Br. 21. Respondent erroneously asserts, however, that his interpretation would not require such findings. As described above, by restricting pretrial motions "delay" to motions that postpone or hinder when trial could possibly begin, respondent would effectively require courts to conduct a reasonableness analysis before excluding time. See pp. 8-9, *supra*. Respondent's approach also would likely lead district courts to make ends-of-justice findings under Section

3161(h)(7) as a backstop when they exclude time under Section 3161(h)(1)(D). Indeed, district courts have already been doing that to avoid possible dismissals under the Sixth Circuit's rule. See note 3, *supra*.

Moreover, many other automatic exclusions in Section 3161(h) also use the phrase "delay resulting from" on which respondent relies. Adopting respondent's interpretation of that phrase would therefore upset the established understanding that those other exclusions apply regardless of whether trial is postponed and exclude the entire time during which the triggering proceeding is pending. See Pet. Br. 27-29.

As for the legislative history, respondent does not dispute that numerous statements in the committee reports equate the phrase "delay resulting from" a motion or other proceeding with the time that the proceeding is pending, rather than any time by which trial is postponed. Nonetheless, respondent asserts that those statements "presuppose a finding" that the motion or other proceeding "impeded pretrial preparations or postponed when trial could begin." Br. 26. Contrary to that assertion, several of the statements make clear that Section 3161(h)(1)(D) "provides exclusion of time from the filing to the conclusion of hearings on or 'other prompt disposition' of *any* motion." S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979) (emphasis added); see, *e.g.*, *id.* at 33 (stating, without qualification, that Section 3161(h)(1)(D) excludes "the entire period of time from the date of filing to the conclusion of hearings on, or other prompt disposition of, pretrial motions"). Although respondent strains to draw contrary inferences from a couple of isolated statements in the committee reports (Br. 26-27), he fails to identify even a single passage stating that the "delay resulting from" a motion is the time during which trial

is postponed or that the pretrial motions exclusion applies only when trial is postponed.

The traditional tools of statutory construction thus support the longstanding rule, followed by every circuit except the court below, that the filing of any pretrial motion automatically stops the speedy trial clock, without any need to inquire whether it would or could affect the trial schedule. Accordingly, this Court should reverse the decision below.

II. RESPONDENT'S ALTERNATIVE GROUNDS FOR AFFIRMANCE LACK MERIT AND DO NOT WARRANT THIS COURT'S REVIEW

Respondent advances (Br. 36-50) two alternative grounds to defend the judgment. Contrary to respondent's contention (Br. 12 n.2), this Court can and should reverse the decision below without addressing those arguments, which the court of appeals correctly rejected. This Court may, in its discretion, "decline to entertain" alternative grounds offered to defend a judgment "[i]n the absence of * * * an indication that the issues are of sufficient general importance to justify the grant of certiorari." *United States* v. *Nobles*, 422 U.S. 225, 242 n.16 (1975); see Eugene Gressman et al., *Supreme Court Practice* 490 (9th ed. 2007). Respondent's alternative arguments lack sufficient importance to warrant this Court's review, and they are without merit in any event.

A. No Additional Non-Excludable Time Elapsed During Respondent's Transportation To His Competency Examinations

Respondent contends (Br. 36-47) that ten days of non-excludable time elapsed during his transportation to a mental competency examination, because Section 3161(h)(1)(F) permitted exclusion of only "ten days" and the transportation took 20 calendar days. The court below, relying on

United States v. *Bond*, 956 F.2d 628 (6th Cir. 1992), held that only two non-excludable days elapsed because weekends and holidays did not count towards the ten-day limit. *Bond* held that Section 3161(h)(1)(D) should be construed in accordance with Federal Rule of Criminal Procedure 45(a), which, at the time, excluded weekends and holidays for time limits of less than 11 days. 956 F.2d at 632. Respondent argues that the court below erred in construing Section 3161(h)(1)(F) in accordance with Rule 45(a).

This Court should not address respondent's argument because, as respondent conceded in his brief in opposition (at 15 n.9), the issue has no continuing importance. Rule 45(a) was amended after the decision below and now expressly applies to statutes like Section 3161(h)(1)(F) that do not specify a method of computing time. Moreover, the Rule now provides that intermediate weekends and holidays count towards any time limit stated in days. Fed. R. Crim. P. 45(a).

In any event, the court below correctly relied on Rule 45(a) in construing Section 3161(h)(1)(F). The statute does not specify whether the "ten days" of excludable time are calendar or business days. It is therefore reasonable to infer that Congress expected courts to interpret that phrase in light of the counting rules applicable in similar criminal contexts. See *United States* v. *Skanes*, 17 F.3d 1352, 1354 (11th Cir. 1994) (citing decisions relying on Rule 45(a) in construing other STA time limits). Accordingly, the court below appropriately looked to Rule 45(a), the Federal Rule of Criminal Procedure governing the computation of time limits, to determine whether weekends and holidays counted towards the ten-day limit.

Every circuit that has addressed the issue has reached the same conclusion. See *United States* v. *McGhee*, 532 F.3d 733, 738 (8th Cir. 2008); *United States* v. *Garrett*,

45 F.3d 1135, 1140 n.6 (7th Cir.) cert. denied, 514 U.S. 1134 (1995). The circuit court decisions cited by respondent (Br. 38) did not address the issue but simply included weekends and holidays when calculating the ten-day period. See *United States* v. *Collins*, 90 F.3d 1420, 1427 (9th Cir. 1996); *United States* v. *Noone*, 913 F.2d 20, 25-26 (1st Cir. 1990), cert. denied, 500 U.S. 906 (1991); *United States* v. *Castle*, 906 F.2d 134, 137 (5th Cir. 1990). And *United States* v. *Williamson*, 409 F. Supp. 2d 1105, 1107 n.1 (N.D. Iowa 2006), was abrogated by the Eighth Circuit's decision in *McGhee*.

Respondent observes (Br. 37) that, in *Henderson*, 476 U.S. at 323, and *United States* v. *Rojas-Contreras*, 474 U.S. 231, 236 (1985), this Court counted calendar days when determining compliance with the time limits in Section 3161(c)(1) and (2). That was entirely consistent with Rule 45(a), however, because those time limits far exceed ten days. Citing an article in American Jurisprudence 2d, respondent also argues that Section 3161(h)(1)(F) should be interpreted to incorporate a purported "common-law rule" that weekends and holidays are excluded only for statutory time periods of seven days or less. Br. 37. The vast majority of the cases cited in the article, however, did not construe statutory or other time limits to incorporate any "common-law rule." Instead, like the decision below, they construed the time limits in accordance with related rules of civil or criminal procedure. See 74 Am. Jur. 2d Time § 22 n.1 (2001).

Respondent also argues (Br. 40-41) that because certain other statutes expressly exclude weekends and holidays, and Section 3161(h)(1)(F) does not, Congress must have intended Section 3161(h)(1)(F) to include them. But none of the other statutes was enacted by the same Congress as, or even near in time to, Section 3161(h)(1)(F). The negative

implication that respondent seeks to draw therefore has little, if any, force. See *Johnson* v. *United States*, 130 S. Ct. 1265, 1272-1273 (2010). Finally, respondent offers various arguments (Br. 41-47) why former Rule 45(a) did not apply of its own force to statutes. The relevant question, however, is not whether former Rule 45(a) applied of its own force but instead whether Congress intended the phrase "ten days" in Section 3161(h)(1)(D) to be construed consistently with the Rule. The court below correctly concluded that it did, and that ruling does not warrant this Court's review.

B. No Additional Non-Excludable Time Occurred During The Competency Examinations

Respondent also contends (Br. 47-50) that the court of appeals should have counted as non-excludable time several weeks during which his competency evaluations were pending. He argues that 18 U.S.C. 4247(b), which generally limits to 30 days the time during which a defendant may be committed for a competency evaluation under 18 U.S.C. 4241, should also limit the STA's exclusion for delay resulting from competency evaluations. The court below correctly rejected that argument, and this Court should not revisit the issue.

Respondent's argument is contrary to the plain language of the STA, which excludes "[a]ny period of delay" resulting from competency examinations, 18 U.S.C. 3161(h)(1)(A). Respondent attempts to avoid that clear text by arguing (Br. 48-49) that Section 3161(h)(1)(A) and Section 4247(b) should be read *in pari materia*. That principle has limited force, however, when statutes were not enacted "by the same legislative body at the same time," *Erlenbaugh* v. *United States*, 409 U.S. 239, 244 (1972), and Section 4247(b) was enacted by the Insanity Defense Reform

Act of 1984, Pub. L. No. 98-473, § 403(a), 98 Stat. 2065, many years after the STA's enactment in 1974. Moreover, the two statutes should not be read *in pari materia* because they do not "serve the same function." *Erlenbaugh*, 409 U.S. at 245. Section 4247(b) protects defendants' liberty interests by restricting the time during which they may be involuntarily committed for mental examinations. Section 3161(h)(1)(A), in contrast, ensures that the STA's deadline for commencing trial accommodates the time spent in competency evaluations without sacrificing the goal of promoting speedy trials. The court below therefore correctly rejected respondent's argument, and no court of appeals has held to the contrary. See *United States* v. *Taylor*, 353 F.3d 868, 869-870 (10th Cir. 2003) (holding the same as the court below), cert. denied, 541 U.S. 1018 (2004); *United States* v. *Fuller*, 86 F.3d 105, 106-107 (7th Cir. 1996) (same); *United States* v. *Miranda*, 986 F.2d 1283, 1285 (9th Cir.) (same), cert. denied, 508 U.S. 929 (1993); but cf. *United States* v. *Huguenin*, 950 F.2d 23, 27-28 n.4 (1st Cir. 1991) (expressing the contrary view in dicta).

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

FEBRUARY 2011

AMICUS CURIAE BRIEF

No. 09-1498

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

JASON LOUIS TINKLENBERG,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL"), a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients.[1] NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; to foster the integrity, independence and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has 10,000 members nationwide – joined by 80 state and local affiliate organizations with 28,000 members – including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. Because this case raises important questions concerning a criminal defendant's right to a speedy trial, NACDL offers its practical view of the issues considered by this Court.

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1. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL, has made any monetary contribution to its preparation or submission. See Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

SUMMARY OF ARGUMENT

This Court need not guess whether an "actual delay" rule will create significant administrative burdens, or whether it will "frustrate altogether, the parties' and the court's ability to comply with the Act." See U.S. Br. 36. Parties and courts have applied the rule in the Sixth Circuit for over fifteen months. See United States v. Tinklenberg, 579 F.3d 589 (6th Cir. 2009) (decided September 3, 2009). District courts have had ample time to implement any changes deemed necessary, and practicing attorneys have had an opportunity to adjust to the rule.

To assess the effect of Tinklenberg, amicus contacted defense attorneys who regularly practice in each of the district courts in the Sixth Circuit, including the Northern and Southern Districts of Ohio, the Eastern and Western Districts of Michigan, the Eastern, Western, and Middle Districts of Tennessee, and the Eastern and Western Districts of Kentucky. The attorneys were asked how Tinklenberg has affected their practice and how courts have managed pretrial motions under the Speedy Trial Act ("STA") both before and after Tinklenberg.

As discussed below, the Tinklenberg "actual delay" rule has not created administrative chaos with respect to administration of the speedy trial clock. Courts have easily determined whether motions cause delay. The rule is both workable in practice and fair in result. For these and other reasons, amicus urges this Court to adopt the "actual delay" rule established by the Court of Appeals for the Sixth Circuit.

ARGUMENT

I. The Tinklenberg "actual delay" rule has not frustrated the courts' and parties' management of the speedy trial clock.

First, practicing attorneys made clear that Tinklenberg has had little impact on the administration of the speedy trial clock. In fact, many attorneys in the Circuit were unaware that a rule had changed with respect to pretrial motions and STA.

Attorneys familiar with the Tinklenberg rule reported that it has been easy to determine whether a motion is likely to cause delay. The rule has not resulted in a noticeable increase in the amount of litigation pertaining to pretrial motions and the speedy trial clock.

To be sure, some courts made minor adjustments to their procedures after the Sixth Circuit decided Tinklenberg. In the Eastern District of Tennessee, for example, attorneys observed that post-Tinklenberg, courts began to ask defense counsel if they object to time being excluded under the STA when a motion was filed. The same was reported in the Western District of Michigan where Mr. Tinklenberg's case originated.[2]

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2. Some attorneys reported that Tinklenberg has had an impact on district courts' treatment of time associated with mental competency evaluations. One practitioner, for example, explained:

Practitioners in those districts, however, reported that they rarely object to the tolling of the clock, and have seen no increase in litigation with respect to the exclusion of time for pretrial motions. Courts simply ask parties whether they agree if time should be excluded. In the rare case that the parties disagree, the court makes a finding.

Likewise, practitioners have not experienced an increased difficulty in tracking the number of days that have expired under the speedy trial clock. Judges simply state whether a motion stops the clock, and the parties then have a clear sense of the time that has expired.

> Before this email, I was familiar with the [Tinklenberg] case. I was always required to stipulate whether motion time was excluded, but not usually in cases involving mental health questions. Since Sept. 2009, now especially in mental health cases, we are not only required to stipulate, but Tinklenberg is specifically mentioned in the orders.

This comment relates to a specific aspect of the Tinklenberg opinion. In any event, these observations do not evidence any particular difficulty managing the speedy trial clock. With regard to other types of pretrial motions, no practitioners reported difficulties in managing the speedy trial clock.

In sum, Tinklenberg's "actual delay" rule does not appear to have complicated the administration of pretrial motions and the speedy trial clock for parties or district judges in the Sixth Circuit. The experience of local attorneys provides no support for the government's apparent concern that the rule will frustrate the parties' and the courts' ability to comply with the STA.

II. Courts have effective systems for informing parties when an event tolls the speedy trial clock.

The lack of practical impact of the "actual delay" rule can be explained, at least in part, by systems courts have developed to communicate a motion's effect on the speedy trial clock. Many of these systems pre-date Tinklenberg.

Courts communicate STA findings in a variety of ways, depending on how a judge manages his or her courtroom and docket. In one district, judges announce a motion filing deadline, and schedule a status report conference for that date. In the status conference, each party provides a summary of the motions he or she is filing, and indicates whether he or she agrees that the speedy trial clock should be tolled with respect to each motion. The court makes a STA finding, and communicates the finding in an order or a docket journal entry. This system very rarely results in litigation relating to the STA, and is easy to manage.

In other districts, courts designate whether time

is "excludable" in the Electronic Case Filing system when a motion is filed. Time associated with motions is marked "excludable" by default. If the court determines that a motion, such as a motion for discovery, is administrative and does not toll time, the clerk manually removes the "excludable" flag in the system. The court and parties can then view the docket, and easily determine how many days have elapsed under the speedy trial clock. Again, these are simple, manageable procedures that do not generate litigation or delay adjudication of the case.

In sum, while the mechanics of managing the speedy trial clock vary, judges and their clerks have developed user-friendly systems to ensure that both parties are informed "at the time that a motion is filed whether the motion has stopped the speedy trial clock." U.S. Br. 36-37. The courts appear to make and communicate findings simply and effectively, using a system that is convenient for them, the litigants, and counsel.

III. It is typically easy to determine which motions are likely to cause delay.

Practitioners across the Circuit also report that it is almost always easy to determine whether a motion is likely to cause delay.

Motions can generally be divided into one of three categories. First, there are substantive motions, such as motions to suppress or motions in limine, which almost always cause delay. These motions address contested legal issues, are frequently opposed,

and may require evidentiary hearings or oral arguments.

In applying Tinklenberg, many district courts in this Circuit have readily found that these types of substantive motions cause delay. In United States v. Siler, for example, the court found a defendant's motion to suppress was "of such a nature that the time required to determine the issue created excludable time." No. 3:10-CR-71, 2010 U.S. Dist. LEXIS 76333, at *2 (E.D. Tenn. July 28, 2010). Likewise, in United States v. Gump, the court held it would "need time to hear and rule upon" a motion to dismiss, and that "[d]efendants' motion [wa]s of such a nature that the time required to determine the issues creates excludable time." No. 3:10-CR-94, 2010 U.S. Dist. LEXIS 95889, at *6-7 (E.D. Tenn. Sept. 14, 2010).[3]

In these cases, district courts made "actual delay" determinations easily and with little fanfare. Moreover, practitioners report that defense counsel rarely object to excluding time under the STA for

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3. Courts have reached similar results in a number of other cases. See , e.g., United States v. Sutton, No. 3:09-CR-139, 2009 U.S. Dist. LEXIS 119436, at *2 (E.D. Tenn. Dec. 22, 2009) (finding that defendant's pretrial motions "[were] of such a nature that the time required to determine the issues creates excludable time"); United States v. Jerdine, No. 1:08-CR-00481, 2009 U.S. LEXIS 117919, at *13 (N.D. Ohio Dec. 18, 2009) (finding that defendant's motions were "complex in nature and that the time required to rule upon these motions causes a delay of the trial, and thus, creates excludable time").

substantive motions. There is no practical support for the Government's suggestion that individualized determinations of whether a particular motion actually caused delay would "force courts to resolve intractable causation issues," and could raise "metaphysical" questions that "frequently would pose more difficult issues than the trial itself[.]." U.S. Br. 37-38 (internal quotations and citations omitted).

Second, there are "administrative" motions for which it is obvious that no delay will ensue. These motions ordinarily are short, unopposed, and require no hearing. Parties may file these motions as a matter of protocol, to ascertain the logistics of a trial, or to record an agreement the parties have reached. Examples include a routine motion for discovery, a motion to permit defense counsel to appear in a case pro hac vice, or an unopposed motion to modify a defendant's bond to permit travel outside the district.[4] Because it is obvious to both the court and the parties that these motions are administrative, it is easy for courts to determine that these motions do not cause delay.

Third, there are "borderline" motions that are

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4. Two of the motions addressed in Tinklenberg – a motion to bring two guns into the courtroom as evidence, and a motion to conduct a video deposition of a witness – are also examples of administrative motions. See Tinklenberg, 579 F.3d at 597. As the Sixth Circuit explained, "these motions were resolved without a hearing, and without any motion or order to delay the start of trial." Id.

not obviously substantive or administrative. These motions might require a hearing, and might be opposed, depending on the circumstances of the case. For this category of motions, a court can ask the parties whether they object to tolling the speedy trial clock. If there is an objection, the court can hear each party's position, and then make a finding.

In sum, based on attorney practices throughout the Sixth Circuit, it is almost always possible to determine, at the time a motion is filed, whether it will cause delay. For those instances where that is not so, defense counsel are typically willing to stipulate to the exclusion of time for adjudication of the motion. Moreover, decisions within this Circuit show that courts are well-equipped to apply Tinklenberg in a practical, straightforward manner. Consequently, the "actual delay" rule has not been difficult to manage in day-to-day litigation.[5]

IV. Defense attorneys commonly stipulate to exclude time under the STA.

As discussed above, there are relatively rare occasions when it is not clear at the time of filing whether a motion will cause delay. In these situations, defense counsel are often willing to stipulate to excluding time from the speedy trial clock

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5. While amicus canvassed defense counsel only in the Sixth Circuit, there is nothing in the responses to suggest any substantially different experiences would arise in other circuits if the "actual delay" rule were applied there.

so that the motion can be considered.

The willingness of counsel to stipulate stems from circumstances unique to federal court. In many state prosecutions, the state arrests a defendant with little or no advance planning in response to an officer's observation or a report of a crime. The parties, therefore, have relatively equal knowledge of the facts and circumstances of the case at the time of arrest. As a consequence, it may be strategically advisable for a defendant to assert his or her right to a speedy trial.

In federal prosecutions, in contrast, crimes tend to span a considerable period of time. It is not unusual for the government to investigate a case for months or even years, and then arrest the defendant when it feels its case is ready. When an arrest is made, the defendant needs time to understand the charges, review voluminous discovery, and investigate the case. This situation is exacerbated in many cases where the defendant faces the logistical challenges of being detained in a federal facility that is out of state or far from the defense attorney's office.

Federal defendants also need time to come to terms with often severe (and unanticipated) potential punishments, negotiate a detailed plea agreement, and/or prepare for trial. Moreover, defendants are often the moving parties for substantive or "borderline" motions, and rarely want to pressure a court to decide a motion quickly for fear of a STA violation.

For these and other reasons, counsel throughout

the Sixth Circuit report that they rarely contest the exclusion of time under the STA.[6] Stipulations are, therefore, an eminently useful and simple tool to aid in management of the speedy trial clock.

V. Amicus supports a rule that does not exclude time for routine, administrative motions. However, district courts should retain the flexibility to accept stipulations and toll time for substantive motions.

This case has the potential to impact two categories of defendants.

The first category includes the relatively rare but important defendant, like Mr. Tinklenberg, who asserts his right to a speedy trial. This client plainly benefits from an "actual delay" rule that does not exclude time for routine, administrative motions. The rule is fair. If a defendant insists upon his or her constitutionally guaranteed right to a speedy trial, the government should not be able to stop the clock by filing routine administrative motions, as it did in Tinklenberg. A rule that is so easily manipulated frustrates the purpose of the STA.

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6. To be sure, once a defendant, like Mr. Tinklenberg, decides to proceed to trial, the strategy may change. The defendant then is more likely to assert his or her right to a speedy trial. Under these circumstances, the defendant should have the right to insist on the constitutional protections of the STA and to prevent the government from manipulating the clock by filing administrative motions.

The second category of defendants encompasses the majority of federal defendants who seek to delay prosecution and to slow down the speedy trial clock for the legitimate reasons discussed above.

These defendants would not oppose a rule that prohibits tolling the speedy trial clock for administrative motions. This rule would benefit them if they chose to proceed to trial. They would be harmed, however, by a rule that inadvertently causes judges to rush to judgment on substantive pretrial motions for fear that they are under greater scrutiny or are more likely to violate the STA.

In the interest of both categories of defendants, amicus urges this Court to affirm the Sixth Circuit's holding and to implement a rule that does not toll time for administrative motions that obviously do not cause delay. As explained above, this type of common sense rule is eminently workable in practice and fair in result. Amicus also urges this Court to emphasize that district court judges are free to accept stipulations by counsel, so long as a motion is substantive, or "borderline," in nature.

In sum, an "actual delay" rule is a fair, workable rule that prohibits exclusion of time for non-substantive, administrative motions. It can also provide parties and courts the flexibility to take ample time to consider motions that involve substantive issues of law. For these reasons, amicus urges this Court to affirm the judgment of the Sixth Circuit.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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